(24,431)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 687.

GEORGE G. JOHNSON, AS TREASURER OF THE STATE OF SOUTH DAKOTA, APPELLANT,

vs.

WELLS FARGO AND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1915.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1913, of said Court, Before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable John A. Riner, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fourth day of September, A. D. 1913, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Wells Fargo and Company is Appellant and George G. Johnson, as Treasurer of the State of South Dakota is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 *Citation.*

In the District Court of the United States for the District of South Dakota, Southern Division.

No. 628. In Equity.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant..

The United States of America to the above named Defendant, George G. Johnson, as Treasurer of the State of South Dakota, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the District Court of the United States for the District of South Dakota wherein Wells Fargo & Company is appellant and you are appellee to show cause if any there be why

the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the District Court of the United States for the District of South Dakota, this 18th day of July, 1913.

JAS. D. ELLIOTT,
Judge of the District Court of the United States for the District of South Dakota.

We hereby accept service of the foregoing citation this 21st day of July, 1913.

ROYAL C. JOHNSON,
L. T. BOUCHER,
Solicitors for George G. Johnson as Treasurer of the State of South Dakota.

Filed in the District Court on July 25, 1913.

(*Subpœna and Marshal's Return of Service.*)

UNITED STATES OF AMERICA,
Southern Division of the District of South Dakota:

The President of the United States of America to George G. Johnson, as Treasurer of the State of South Dakota, Greeting:

2 You are hereby commanded to be and appear at Rules to be held at the office of the Clerk of the Circuit Court of the United States for the District of South Dakota, on the first Monday of May next, at the City of Sioux Falls, then and there to answer the Bill of Complaint of Wells Fargo & Company citizen of the State of Colorado, filed against you on the 16th day of March, A. D. 1911; hence fail not.

Witness: The Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this 16th day of March, A. D. [189–].

Issued at my office in the City of Sioux Falls, under the seal of said Circuit Court the day and year last aforesaid.

(Seal of Court) OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

MEMORANDUM.—The above named defendant to enter his appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable otherwise the bill may be taken pro confesso.

(Seal of Court) OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

Messrs. Bailey & Voorhees, and Chas. W. Stockton, Esq., Complainant's Solicitors.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Chancery Subpœna; together with Bill in Equity, Affidavits, Motion and Order in said action, on the therein named Defendant George G. Johnson, Treasurer of the State of South Dakota, at Canton, S. D., on the 17th day of March, 1911, by handing to and leaving with him certified copies thereof.

SETH BULLOCK,
United States Marshal,
By JERRY CARLETON,
Deputy.

Endorsed: No. 628. United States Circuit Court, District of South Dakota, Southern Division. Wells Fargo & Company vs. George G. Johnson, as Treasurer of the State of South Dakota. Chancery Subpœna. Returnable to May Rules, 1911. Returned into the Clerk's office and filed this 17th day of March, A. D. 1911. Oliver S. Pendar, Clerk. By Odin R. Davis, Deputy.

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(*Bill of Complaint.*)

In the Circuit Court of the United States, for the District of South Dakota, Southern Division.

In Equity.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota,

Bill.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Dakota, in the Eighth Judicial Circuit:

Your orator, Wells Fargo & Company, a corporation of the state of Colorado, presents this its bill of complaint against George G. Johnson as treasurer of the state of South Dakota and a resident citizen of said state of South Dakota, and shows unto your honors that it is, and was during all the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Colorado and a resident and citizen of the state of Colorado within the meaning of the laws governing the jurisdiction of this court; that the defendant, George G. Johnson as treasurer of the state of South Dakota, is and was during all the times hereinafter mentioned a resident and citizen of the state of South Dakota and a resident of the Southern division of the district of South Dakota and was the State Treasurer of the state of South Dakota.

Your orator further shows that it is, and for many years last past has been, conducting the business of a common carrier popularly and technically described as the express business; that is to say, the quick and safe transportation and transmission over public routes and high-ways by means of railways, steamboats, steamships and other public carriages of money, bank bills, bonds and securities and packages containing articles of greater or less value as contro-distinguished from freight; that since the 1st day of May, 1909, your orator has been and still is conducting such express business in the state of South Dakota; that in the conduct of its said express business since May 1st, 1909, your orator has carried, transported and transmitted packages, money, bonds, securities, goods, wares and merchandise into the state of South Dakota from the states of New York, Pennsylvania, Ohio, Illinois, Iowa and many other of the United States and from the said state of South Dakota into said other states of the United States and through the said state of South Dakota from and to other states of the United States, and
4 from foreign countries to the said state of South Dakota, and still continues so to carry, transport and transmit said packages and property; that it neither owns nor operates any railroads or means of carriage of its own but does said business under contracts with railroad companies and other common carriers owning and operating railroads, rolling stock, ships and other public conveyances.

Your orator further shows that upon the 7th day of March, 1907, there went into effect in the state of South Dakota an Act entitled, "An Act Providing for the Assessment and Taxation of the Property of Railroads, Telegraph, Telephone, Express and Sleeping Car Companies," approved March 7th, 1907, which act by its terms repealed all acts and parts of acts in conflict therewith, and declared an emergency and was duly approved by the Governor of the state of South Dakota on March 7th, 1907, and thereupon became and went into effect as a statute of the state of South Dakota and has never been amended or repealed by any subsequent legislation so far as the same affects companies or associations doing an express business; that pursuant to said statute, and especially to the provisions of section 16 thereof, Wells Fargo & Company did, on or about the 1st day of July, 1910, file its report for the year ending April 30th, 1910,2 and containing a schedule of the property owned by your orator in the state of Sotuh Dakota upon the 1st day of May, 1910; that a copy of said report is as follows:

"Annual Statement of the Wells Fargo and Co. Express Company.

To the State Board of Assessment and Equalization of the State of South Dakota, under authority of an Act entitled "An Act Providing for the Assessment and Taxation of the Property of railroads, telegraph, Telephone, Express and Sleeping Car Companies, Session Laws, 1907.

For the Year Ending April 30th, 1910.

NOTE.—Return Blank in Tube, to State Auditor, Pierre, South Dakota.

Statement Showing the Condition of Wells Fargo & Co. in Each County in the State of South Dakota for the Year Ending April 30, 1910.

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Counties.	No. employers.	No. offices.	Value office furniture, fixtures and real estate.	No. miles operated.	Total gross earnings.
Aurora	3	3	135.20	30.51	2673.27
Beadle	5	3	44.50	31.41	1937.13
Bon Homme	9	6	309.00	69.30	3635.19
Brookings	.	.	.....	.....	.....
Brown	16	7	2204.15	84.76	6995.85
Brule	3	3	779.69	30.13	3751.32
Buffalo	.	.	.....	.....	.....
Butte	.	.	.....	.....	.....
Campbell	.	.	.....	1.64	.....
Charles Mix	4	4	261.33	47.72	7385.12
Clark	6	5	151.16	33.76	1145.65
Clay	4	3	180.61	20.87	1282.01
Codington	.	.	.....	.....	.....
Carson	6	5	47.38	87.45	4321.83
Custer	.	.	.....	.....	.....
Davison	10	4	2312.16	44.86	11059.63
Day	12	8	951.07	67.66	4621.04
Deuel	.	.	.....	.....	.....
Douglas	3	3	132.96	26.80	2426.93
Edmunds	7	6	244.69	75.09	3700.94
Fall River	.	.	.....	.....	.....
Faulk	4	3	78.74	26.11	885.09
Grant	6	4	142.48	40.51	1887.01
Gregory	.	.	.....	.....	.....
Hamlin	1	1	94.96	11.01	796.14
Hand	.	.	.....	.....	.....
Hanson	2	2	128.30	19.79	1640.92
Hughes	.	.	.....	.....	.....
Hutchinson	5	4	241.13	58.39	2964.21
Hyde	.	.	.....	.....	.....
Jerauld	3	3	119.34	17.35	3326.72
Kingsbury	3	3	107.65	26.54	1733.14
Lake	7	6	782.20	57.40	3847.82
Lawrence	.	.	.....	.....	.....
Lincoln	9	6	402.99	46.09	4119.05
Lyman	14	8	232.40	93.32	7425.91
McCook	1	1	93.34	12.08	2516.47

Counties.	No. employers.	No. offices.	Value office furniture, fixtures and real estate.	No. miles operated.	Total gross earnings.
McPherson	4	2	121.53	26.61	1034.16
Marshall	4	3	177.21	24.86	3178.88
Meade	.	.	.....	.....	.....
Miner	4	4..	96.06	24.15	1790.75
Minnehaha	11	4	3774.75	45.21	5654.50
Moody	7	4	277.82	35.91	2189.45
Pennington	6	4	766.41	70.31	3310.48
Perkins	2	1	180.21	4.26	3300.03
Potter	.	.	.....	.....	.....
Roberts	8	7	320.30	40.46	3702.32
Sanborn	6	4	338.42	47.66	3466.91
Spink	8	4	277.32	42.53	3627.70
Stanley	7	4	30.07	53.72	2755.46
Sully	.	.	.....	.....	.....
Turner	6	4	222.55	34.71	1591.14
Union	3	2	245.17	28.40	2136.46
Walworth	5	4	211.29	41.73	3932.26
Yankton	6	4	1307.44	40.45	2347.39
Total	230	156	18473.98	1621.52	131096.28

6 STATE OF ILLINOIS,
County of Cook, ss:

I, Grover B. Simpson of said County and State, being duly sworn depose and say that I am General Superintendent of Wells Fargo & Co. and have examined the foregoing statement; that the same is a full, true and correct statement of the several matters purporting to be covered by said statement, to the best of my knowledge and belief.

GROVER B. SIMPSON.

Subscribed and sworn to before me, Sidney W. Gibson, Notary in and for said county and state this sixth day of June, A. D. 1910.

[NOTARIAL SEAL.] SIDNEY W. GIBSON,
Chicago, Illionis."

Your orator further shows that the statements in said report were, and the same are, true in substance and in fact.

Your orator further shows, that pursuant to the provisions of said statute of the state of South Dakota, the State Board of Assessment and Equalization of said state of South Dakota convened in regular session upon the 5th day of July, 1910, and continued in session until the 10th day of August 1910; that upon the 27th day of July, 1910 the said State Board of Assessment and Equalization of the state of South Dakota fixed a valuation upon the property of your orator for taxation for the year 1910 at $289,877.00; that

thereupon the said state Board of Assessment and Equalization adjourned to meet upon the 10th day of August, 1910.

Your orator further shows that upon the 10th day of August 1910, your orator duly filed its protest with said State Board of Assessment and Equalization of the state of South Dakota against the assessment so made upon it as aforesaid, which protest was in writing and was in words and terms as follows, to-wit:

To the Honorable the State Board of Equalization of the State of South Dakota:

Wells Fargo & Company respectfully protests against the assessment made upon its property in South Dakota for the year 1910, for the following reasons:

First.

Said assessment is excessive and is many times the actual and true value of all the property owned by Wells Fargo & Company and subject to assessment within the state of South Dakota.

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Second.

Said assessment is excessive and out of all proportion to the assessments made upon the property of other corporations and of natural persons subject to taxation within the state of South Dakota for the year 1910.

Third.

In making said assessment the State Board of Equalization has followed an illegal and arbitrary method of ascertaining the value of the property of Wells Fargo & Company subject to taxation in South Dakota for the year 1910.

Fourth.

In making said assessment the State Board of Equalization has unlawfully taken into consideration the interstate earnings of Wells Fargo & Company, and has in effect illegally taxed the same.

Wherefore, the said Wells Fargo & Company does respectfully pray that the said State Board of Equalization reconsider said assessment, and make an assessment upon the property of Wells Fargo & Company subject to taxation in South Dakota for the year 1910 no greater that the actual and true value of said property, and no greater proportionately than the assessment made upon other corporations and upon natural persons.

Dated August 6, 1910.

WELLS FARGO & COMPANY,
By BAILEY & VOORHEES,
Its Attorneys.

Your orator further shows unto your honors that the said State Board of Assessment and Equalization of the state of South Dakota ignored said protest and said report and adjourned sine die without changing the assessment so made as aforesaid upon the property of your orator.

Your orator further shows unto your honors that upon said assessed valuation of $289,877.00 the state Board of Assessment and Equalization of the state of South Dakota did, at its said session in July and August, 1910, levy a tax against your orator for the year 1910 of twenty-eight mills upon said assessed valuation, or $8,116.56.

Your orator further avers that neither the state auditor of the state of South Dakota nor the State Board of Assessment and Equalization nor any of the members thereof, nor any other officer of the state of South Dakota has ever made any objection to said report or to any item, statement or part thereof, so filed by your orator, but that the said state auditor of said state of South
8 Dakota received and accepted the same as filed and placed the same before the said State Board of Assessment and Equalization, which said State Board of Assessment and Equalization received and accepted the same; that neither the state auditor nor said Board, nor any other officer of the state of South Dakota has ever requested your orator to furnish him or it any other or further information respecting its property, and respecting the routes operated by it in addition to that contained in said report.

Your orator further shows that all of the matters and facts stated and set forth in said report and in said protest are true, and alleges and charges the same in this its bill of complaint and asks that they be so considered by the court with the same effect as though now here repeated as independent allegations of fact in this bill of complaint.

Your orator further alleges that by the provisions of said chapter 64 of the Laws of South Dakota of 1907 it is provided that each express and sleeping car company assessed by the State Board of Assessment and Equalization shall, on or before the 1st day of March of each year, pay to the state treasurer the amount of tax levied on its property for the year preceding, and that in case any express company doing business in the state of South Dakota shall fail or neglect to pay the tax due from it to the state for a period of thirty days after the same shall have become due there shall be added to such tax a penalty of twelve percent per annum and that at any time after the expiration of thirty days from the time any such tax has become due and payable the state treasurer shall distrain sufficient property of the delinquent to pay the same, together with such penalty and the cost of distraint and sale, and shall immediately advertise the sale of the same in at least three newspapers published in the state of South Dakota, stating the time when and place where such property shall be sold, and four weeks' notice of the time and place of such sale shall be given, and that such sale shall take place *in* some point in the state of South Dakota and the proceeds thereof shall be applied to the payment of such tax, penalty

and cost; and your orator shows that said tax of $8,116.56 became delinquent upon the 1st day of March, 1911, and that unless the same shall be paid by your orator on or before the 31st day of March, 1911, that the defendant, as state treasurer of the state of South Dakota, will distrain the property of your orator and proceed to sell the same in accordance with the provisions of said chapter 64 of the laws of South Dakota of 1907.

Your orator further shows that the distraint by the defendant as state treasurer of the State of South Dakota of sufficient
9 of the property of your orator to pay said tax, together with the penalty thereon and the cost of distraint and sale, would work irreparable and lasting injury to your orator; that the property of your orator within the said state of South Dakota, subject to distraint and sale, amounts to less than the sum of $19,000.00 in value and is scattered throughout thirty nine counties of the state of South Dakota; that said property consists of the horses, wagons, furniture, fixtures, supplies and other personal property used by your orator in the conduct of its express business and that all of said property possesses but a fraction of said value of $19,000.00 when considered other than in connection with its use in the business of your orator; that all of the property of your orator within the state of South Dakota, if distrained and sold at treasurer's sale, would not bring anywhere near a sufficient amount to pay said tax and the penalty thereon and the cost of distraint and sale; that said property is used daily by your orator in the transaction of its business in the state of South Dakota, and in the transaction of its business between points in the state of South Dakota and points in states other than the state of South Dakota, and points in foreign countries; that the distraint and sale of said property or of any considerable portion thereof by the defendant would render it impossible for your orator to continue carrying on its express business in the state of South Dakota; that should the defendant distrain the property of your orator its express business would be ruined and irreparable injury thereby inflicted upon your orator and your orator would be obliged to institute a large number of actions against said defendant in each of said thirty nine counties in which your orator is transacting its business and in which property of your orator might be distrained for damages caused by the illegal distraint of such property.

Your orator further shows that the sum of controversy and dispute in this suit is over the sum of $2,000.00 and is the sum of said tax, to-wit: $8,116.56.

Your orator further shows that the said State Board of Assessment and Equalization of the state of South Dakota in making said assessment upon the property of your orator in the state of South Dakota, and in levying a tax thereon, wilfully and fraudulently [disregarded] said report and said protest filed by your orator and wilfully and fraudulently disregarded the true an- actual value of the property of your orator in the state of South Dakota; and that said State Board of Assessment and Equalization arrived at said assessment and at said tax in the following manner, to-wit:

That said Board of Assessment and Equalization obtained from the reports of the various railroads transacting business in
10 South Dakota over whose lines your orator conducted its express business the amounts reported by said several railroads as severally paid to them for the year ending April 30th, 1910, by your orator as compensation for the carriage by said railroads of its express matters and ascertained from such reports that the amounts so paid were as follows, to-wit:

Chicago, Milwaukee & St. Paul Railway Company...	$173.373.27
Chicago, Milwaukee & Puget Sound Railway Company.	7,800.45
Total.....	$181,173.72

Your orator further shows that said amount of $181,173.72 was the total amount shown by the reports of the railroads transacting business in the state of South Dakota as paid by your orator for express service during the year ending April 30th 1910.

Your orator further shows that besides your orator, certain, other express companies were during the year ending April 30th, 1910, transacting business as express companies in the State of South Dakota the same as your orator. That the names of the express companies so transacting business in the state of South Dakota were, besides your orator, the American Express Company, the United States Express Company, the Great Northern Express Company and Western Express Company and the Adams Express Company. That each of said express companies made reports to the auditor of the state of South Dakota of its business transacted within the state of South Dakota during the year ending April 30th, 1910, and of the value of its office furniture, fixtures, real estate and other property within the state of South Dakota, of the number of miles operated within said state, of the number of offices within said state and of its total gross earnings for business transacted within said state. That as your orator is informed and believes the report of the American Express Company showed a total value of all of its property within the state of South Dakota on May 1st, 1910, to be $9,151.73 and its gross earnings within the state of South Dakota for the year ending April 30th, 1910, to be $88,181.44, which amounts your orator states upon information and belief to be the full and true value of the property owned by the said American Express Company and the full amount of the gross earning of said American Express Company within the state of South Dakota for the year ending April 30th, 1910. That as your orator is informed and believes the property within the state of South Dakota owned by the United States Express Company and reported
11 by it in its said report to the state auditor was of a value less than the sum of $2,000. That the property owned by the said Great Northern Express Company reported by it in its said report to the state auditor was of a sum less than $2,000. That the property owned by the Western Express Company and reported by it in its said report to the state auditor was less than the sum of $500 and that the property owned by the said Adams Express

Company and reported by it in its said report to the state auditor was of the value less than $6,000.

Your orator further shows that the said State Board of Assessment and Equalization obtained from the reports of the various railroads transacting business in South Dakota over whose lines said various express companies other than your orator conducted their express business, the amounts severally paid to said several railroad companies by said several express companies, other than your orator, as compensation for the carriage by said railroads of the express matter for said several express companies and ascertained from said reports that the amounts reported as so paid by said express companies were as follows:

American Express Company	$120,689.56
Great Northern Express Company	6,626.47
United States Express Company	6,812.22
Western Express Company	1,507.28

Your orator further shows that the report of the Minneapolis & St. Louis Railroad Company showed a payment for express service for the year ending April 30th, 1910, by the Adams Express Company of $4,645.60 and that the report of the Minnesota, Dakota & Pacific Railroad Company showed a payment by the said Adams Express Company for such express services of $12,219.73. That the only other railroad over which the said Adams Express Company transacted business for the year ending April 30th, 1910, was the Chicago, Burlington & Quincy Railroad Company and that in the report of the said Chicago, Burlington & Quincy Railroad Company there was not shown the amount claimed by said railroad Company to be paid to the Adams Express Company for express service in the state of South Dakota during the year ending April 30th, 1910 but that the amount so paid together with other items was reported by said railroad company at the sum of $68,409.96.

Your orator further states upon information and belief that the amounts so reported by the railroad companies as having been paid to them by your orator and by the other express companies transacting business in the state of South Dakota for express service for the year ending April 30th, 1910, were not in truth and in fact
12 the amounts charged by said railroad companies and paid by said express companies for such express service. That said several express companies transact business over the lines of said several railroad companies not only in the state of South Dakota but in the neighboring states of the United States and that in such other states there being a greater population and more [number-ous] business centers, the express traffic is very greatly in excess of the express traffic between different points in the state of South Dakota. That in making their reports to the said State Board of Assessment and Equalization of the amounts paid to them for express service by the express companies transacting business in the State of South Dakota for the year ending April 30th, 1910, said several railroad companies did not report the amounts paid for the express service supplied in the state of South Dakota but obtained

the amounts so reported by dividing the total amounts paid by the express companies for express service over the entire lines of each of said railroads by the mileage of said railroads and then apportioned arbitrarily to the state of South Dakota an amount of the total sum paid by the express companies proportionate to the mileage of the railroads within the state of South Dakota. That by such arbitrary apportionment of the amount paid by the express companies to the railroad companies a showing was made of the earnings by the express companies of a much greater amount from their business in South Dakota than was really earned in their business within said state.

Your orator further shows upon information and belief, and upon such information and belief alleges the fact to be that the said State Board of Assessment and Equalization of the state of South Dakota arbitrarily determined that your orator, regardless of the amount or value of the taxable property within the state of South Dakota, upon the 1st day of May, 1910, or at any time during the year ending April 30th, 1910, should pay a tax of four and one half per cent upon amounts paid by it to said railroad companies and that the same tax should be paid by all of the express companies transacting business within the state of South Dakota. That thereupon the said State Board of Assessment and Equalization fixed a rate of taxation upon the assessments of the various express companies transacting business in South Dakota at twenty eight mills upon each dollar of the assessed valuation. That the said Board of Assessment and Equalization thereupon made a further computation and ascertained the sum which would be realized by a tax of four and one half per cent or forty five [miles] upon each dollar of the amounts paid by the several express companies to the railroad companies as aforesaid for express service and then made a still further computation to ascertain the assessed valuation which would be necessary to obtain the same amount in taxes at a
13 levy of twenty-eight mills upon the dollar. That as a result of said computation said State Board of Equalization made assessments upon the various express companies transacting business in South Dakota and levied taxes thereunder as follows, to-wit:

Your orator reported as having paid the railroads $181,193.72 of which four and one half per cent would be $8,152.79, was assessed by said State Board of Assessment and Equalization at $289,877, upon which assessment a tax of twenty-eight mills was levied amounting to $8,116.55.

The American Express Company reported as having paid the railroads $120,689.56 of which sum four and one half per cent is $5,431.03, was assessed by said State Board of Assessment and Equalization at $193,260, upon which assessment a twenty-eight mill tax was levied amounting to $5,411.28.

The United States Express Company reported as having paid the railroads $6,812.22 of which four and one half per cent would be $306.55, was assessed by the said State Board of Assessment and

Equalization at $10,899, upon which a tax of twenty-eight mills was levied amounting to $305.17.

The Great Northern Express Company reported by the railroads as having paid $6,626.47 of which four and one half per cent would be $298.19, was assessed by said State Board of Assessment and Equalization at $11,278 upon which a tax of twenty-eight mills was levied amounting to $315.78.

The Western Express Company reported as having paid the railroads $1,507.28 of which four and one half per cent would be $67.83, was assessed by said State Board of Assessment and Equalization at $2,262 upon which a tax of twenty-eight mills was levied amounting to $63.34.

The said Adams Express Company was assessed by the said State Board of Assessment and Equalization at the sum of $71,632 and subsequently upon protest being made by the said Adams Express Company, said assessment was reduced to the sum of $40,000 and a tax of twenty-eight mills levied thereon amounting to $1120.

Your orator further states upon information and belief and upon such information and belief alleges the fact to be that the said State Board of Assessment and Equalization purposely so assessed the said American Express Company and the other express companies transacting business within the state of South Dakota that the tax levy should be practically equivalent to forty-five mills upon
14 the amounts paid by the express companies to the railroad companies for express service, but made such assessment in each instance so that it would vary a few dollars from the amount required to make an assessment upon which the twenty-eight mill tax would be exactly the equivalent of forty-five mills upon the sum paid the railroad companies. That in making said assessment the said state Board of Assessment and Equalization disregarded the plain provisions of the constitution of the United States and the constitution of the state of South Dakota and the statutes of the state of South Dakota, and disregarded wholly the report and protest made as aforesaid by your orator and disregarded wholly the value of the property of your orator and disregarded wholly the value of the property owned by the other express companies within the state of South Dakota and the reports made respectively by said express companies and wilfully and fraudulently assessed the property of your orator in the State of South Dakota at many times the actual value in the sum of $289,877 and levied thereon said tax of $8,116.56. That your orator is informed and believes it was the purpose and intent of the said State Board of Assessment and Equalization in making said assessment upon your orator and in levying said tax upon your orator and in making said assessment upon the other express companies within the state of South Dakota, to force your orator and said other express companies to pay a gross earnings' tax of two and one fourth per cent upon the gross earnings of your orator and of said other express companies from business transacted both wholly within the state of South Dakota and partly without said state and within other states, that is, to impose upon your orator and said other express

companies a gross earnings' tax of two and one fourth per cent upon all business of your orator and of said other express companies, both intra-state and interstate, transacted wholly or partly within said state of South Dakota. That to obtain such gross earnings of your orator and of the other express companies transacting business within the state of South Dakota, the said State Board of Assessment and Equalization arbitrarily assumed that the amounts reported by the railroad companies as having been paid to them by your orator and by the other express companies transacting business in South Dakota were fifty per cent of the gross receipts of your orator and of said other express companies arising from their business interstate and intrastate in the state of South Dakota an assumption which in the case of your orator at least was not warranted by the facts.

Your orator further shows unto your honors that the said act of the said State Board of Assessment and Equalization in making said assessment upon the property of your orator and in levying said tax thereon is without authority of law and is in violation of law in this, to-wit:

1. That by the method used by said State Board of Assessment and Equalization in making said assessment and in levying said tax the property of your orator was assessed at more than fifteen times its true and actual value in money and that the tax levied under said assessment amounts to more than thirty times the tax paid by other natural persons, associations, partnerships and corporations upon their respective property holder- in the State of South Dakota.

2. That said act of said State Board of Assessment and Equalization is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that by said act your orator is denied the equal protection of the laws.

3. That by the method of procedure adopted and followed by said State Board of Assessment and Equalization in making said assessment upon the property of your orator, and levying a tax thereon your orator is deprived of its property without due process of law and is denied the equal protection of the law in violation of the provisions of the Constitution of the United States guaranteeing such respective rights.

4. That the provisions of chapter 64 of the Laws of South Dakota of 1907, relating to the assessment and taxation of the property of express companies are in contravention of section 1 of the Fourteenth amendment to the Constitution of the United States and of section 8 of article 1 of the Constitution of the United States.

5. That the provisions of chapter 64 of the laws of South Dakota of 1907 relating to the assessment and taxation of the property of express companies, are in violation of sections 2, 9 and 10 of article XI of the Constitution of the state of South Dakota.

6. That said act of the State Board of Assessment and Equalization in making said assessment and tax levy upon the property of your orator is in contravention of sections 2, 9 and 10 of article XI of the Constitution of the state of South Dakota and in violation of section 2 of article VI of said Constitution.

7. That chapter 64 of the Laws of South Dakota of 1907 is in contravention of Section 211 of article III of the constitution of the state of South Dakota.

16 Your orator further shows that in making said assessment upon the property of your orator the said State Board of Assessment and Equalization took into consideration, not only the intrastate business conducted by the United States Express Company, but also took into consideration the interstate business conducted during said year between points in the state of South Dakota and points in other states and in foreign countries, and took into consideration the entire gross income received by the said United States Express Company for the transaction of both interstate and intrastate business in South Dakota during the year 1910.

Your orator further shows unto your honors that twenty-eight mills upon each dollar of assessed valuation was equal to the average amount of state, county school, municipal, road and bridge and other local taxes levied upon other property in the state of South Dakota for the year preceding the making of said assessment upon the property of your orator, and was the average amount of such tax for the year for which said assessment was made in the various counties and subdivisions thereof through which your orator has transacted its business since May 1st, 1910, and in which its property is situated.

Your orator further states upon information and belief, and charges the fact to be, that the average assessed valuation of the property, both real and personal, belonging to individuals in the state of South Dakota in the year 1910 was not to exceed forty per cent of the true and actual value in money of such property.

Your orator further shows that no assessment has been made upon its property in any of the counties of the state of South Dakota by the local assessing and taxing officers of such counties and of the various municipal and other taxing organizations contained in such counties; and that no tax levy has been made against its property in the state of South Dakota for the year 1910 excepting said levy by the said State Board of Assessment and Equalization; that your orator is ready and willing to, and now offers so to do, to bring unto this court for the payment by the court's direction unto the proper state and county officers, any and all taxes of whatsoever kind that have been levied or are leviable against your orator in the state of South Dakota, except said tax levied and assessed against your orator in the state of South Dakota by the said State Board of Assessment and Equalization, in the year 1910, as hereinbefore set forth, and your orator is ready and willing to, and now offers to secure the payment of all, or of such part of said last mentioned tax, to the approval of this court, that the court may upon

17 final hearing of this cause find should be paid by your orator.

Your orator further shows that by the laws of the state of South Dakota said tax assessed and levied by the State Board of Assessment and Equalization, as aforesaid, upon the property of your orator in the state of South Dakota, constitutes a lien upon all of your orator's

personal property and constitutes a cloud upon your orator's title thereto.

In consideration *wherefore* and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable to the end therefore that the defendant against whom process is hereinafter prayed, if he can, show why your orator should not have the relief hereby prayed, and that he, the said defendant, may, but not under oath, oath being hereby waived, to the best and uttermost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer made to all and singular the matters and things hereinbefore set forth and alleged as fully and completely as if the same were here repeated, and he, the said defendant, thereunto severally and specifically interrogated paragraph by paragraph that a temporary injunction may forthwith issue herein against the defendant George G. Johnson as treasurer of the state of South Dakota, enjoining and restraining him from distraining any of the property of your orator to enforce payment of the tax assessed and levied against your orator by the State Board of Assessment and Equalization of the State of South Dakota in the year 1910 and enjoining and restraining him and his successors in office from taking any action of any kind, nature or character whatsoever towards the collection of said tax or looking towards the compelling of the payment of the same until a hearing can be had herein; and that upon the final hearing of this cause said defendant and his successors in office be perpetually enjoined from distraining any property of your orator to recover the amount of said tax and from taking any proceedings of any kind, nature or character whatsoever looking towards the collection of said tax [*to*] towards the enforcement of the payment of the same; that said tax and the assessment upon which the same was based be respectively declared invalid and void and said tax cancelled and that there be granted unto your orator all other and proper relief in the premises.

18 And it may please your honors to grant unto your orator the writ of subpœna of the United States of America issued out of and under the seal of this honorable court directed to the said defendant George G. Johnson as treasurer of the state of South Dakota, commanding him at the proper time and under the proper penalty, both to be named therein, to be and appear in this honorable court then and there to answer all and singular the matters and things hereinbefore stated and charged and to stand to, perform and abide by such further order, direction and decree as may be made against him.

And your orator as in duty bound, will ever pray, etc.

WELLS FARGO & COMPANY,
By E. A. STEDMAN,
Its Vice-President.
BAILEY & VOORHEES,
Solicitors for Plaintiff.
CHAS. W. STOCKTON,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

E. A. Stedman, being first duly sworn on oath says that he is the Vice President of Wells Fargo & Company, the plaintiff in the foregoing bill of complaint; that he is authorized to and does sign this affidavit on behalf of the said Wells Fargo & Company, complainant in said cause; that he has read the foregoing bill of complaint and knows the contents thereof; that the matters and facts therein stated are true as he is informed and verily believes.

E. A. STEDMAN.

Subscribed and sworn to before me this 7th day of March, 1911.
[NOTARIAL SEAL.] A. H. FAWKNER,
Notary Public, County of Kings, State of New York.

Certificate filed in New York County.

Endorsed: Filed in the Circuit Court on Mar. 16, 1911.

The Answer of George G. Johnson, as Treasurer of the State of South Dakota, to the Bill of Complaint of the Plaintiffs.

This Defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

19

That as to the statements in the said Bill contained relating to the organization, principal place of business, and membership of Wells Fargo & Company, value of the shares of stock, and residence of the stockholders, and as to all of the matters alleged in the Bill of Complaint relative to the organization of said Wells Fargo & Company, I have no knowledge in respect thereto, and demand strict proof thereof.

I admit that Wells Fargo & Company is, and has for many years last past been conducting the business of a common carrier, popularly and technically described as the Express Business.

I admit that said Wells Fargo & Company has been, for more than twenty years last past, and still is conducting such express business in the State of South Dakota, and

I admit that said Wells Fargo & Company does not own or operate any railroads, but does said express business under contracts with railroad companies and through common carriers owning and operating railroads.

I admit that Wells Fargo & Company is a corporation organized and *and* existing under the laws of the State of Colorado, and that I am a citizen and resident of the State of South Dakota, and that

I am now, and was, at the date of the commencement of this suit, the State Treasurer of the State of South Dakota.

I admit that Wells Fargo & Company submitted a statement purporting to show the condition of Wells Fargo & Company in each county in the state as set forth at pages 3, 4 and 5 of Plaintiff's Bill of Complaint, but I deny that said statement was a full and complete statement of the property owned by said Wells Fargo & Company in the State of South Dakota during the year ending April 30th, 1910.

I deny that said statement gave the value of all the property of such company used in this state during the year ending April 30th, 1910.

I deny that the Board of Assessment and Equalization of the State of South Dakota assessed any property of the American Express Company not within the State of South Dakota.

20 I am informed and believe, and therefore allege the fact to be, that the said company owned and used large sums of money in its business in South Dakota during the year ending April 30th, 1910; that said company did not report or list any money whatever for taxation in its said statement, or in any other way or manner, but fraudulently and deceitfully omitted from its said statement, and concealed from the state auditor and the State Board of Assessment & Equalization of South Dakota the fact that it had large sums of money and used large sums of money in its business in South Dakota during the year ending April 30th, 1910; I allege the fact to be that the said Wells Fargo & Company further violated Section 16 of Chapter 64 of the laws of 1907, in this, that it fraudulently omitted from its said statement to the State Auditor a full and fair account of its business done within the state for the year ending April 30th, 1910, and a full and fair account of gross earnings of the total business of such company transacted within this state for the year ending April 30th, 1910.

I allege the fact to be that the said company did a large banking exchange business in this state by way of the sale of, and by the cashing of money orders, foreign drafts, travellers, checques, and letters of credit during the year ending April 30th, 1910, and earned and used in said branch of its business in this state large sums of money, none of which was reported by said company in its said statement to the State Auditor, but all of which was fraudulently concealed by it, under the fraudulent and deceitful claim that it only received money at its offices for shipment as a common carrier, while in truth and in fact it did, during all of the year ending April 30th, 1910, advertise on sign boards in front of its offices in this state, the fact that it sold "Money orders, foreign drafts, travellers' checques, and letters of credit," and it did sell and cash such orders, checques and letters of credit.

I am informed and believe, and therefore allege it to be a fact, that the said Wells Fargo & Company did not list all of its property within the State of South Dakota in said statement, and did not give the true value thereof, but that the amount and value of the

property belonging to the Wells Fargo & Company within the State of South Dakota, during the year ending April 30th, 1910, was greatly in excess of the amount shown in said statement, but as to the exact amount of excess in the items and the value thereof, I am unable to state for the reason that said property was wholly
21 under the dominion and control of said Wells Fargo Company and was not open to my inspection.

I admit that the said Board of Assessment and Equalization of the State of South Dakota convened in regular session on the 5th day of July, 1910, and continued in session as stated in said Bill of Complaint, and that the said Board of Assessment and Equalization fixed a valuation upon the property of the said Wells Fargo & Company for the year 1910 at $289,877.

I admit that Wells Fargo & Company filed a protest against the tax imposed, in manner and form as stated in its said Bill of Complaint.

I deny that said Board of Assessment and Equalization made no objection to said report of said Wells Fargo & Company and, on the contrary, I allege that the said Board of Assessment and Equalization did make objection to the report, and did refuse to accept the same as true, for the reason that said statement did not contain a full, true and complete statement of the property owned by Wells Fargo & Company in the State of South Dakota during the year ending April 30th, 1910, for the reason that the said statement did not correctly state the true value of the property belonging to said Wells Fargo & Company within the State of South Dakota during the year aforesaid.

I admit that the tax levied against said Wells Fargo & Company by the said Board of Assessment and Equalization of South Dakota for the year 1910 has not been paid, and that under the laws of the State of South Dakota I shall attempt to collect the same by distraint and sale of some of the property of said Wells Fargo & Company within the State of South Dakota, but that no more property will be seized and sold than is sufficient to pay said tax, or so much thereof as this honorable court may find to be due.

I deny that the collection of said tax, or the distrain of sufficient property belonging to said Wells Fargo & Company to pay said tax, will work irreparable and lasting injury to Wells Fargo & Company, and

I deny that the property of Wells Fargo & Company within the state of South Dakota subject to distraint and sale, is less than the sum of eighteen thousand four hundred seventy-three and ninety-eight hundreths, ($18,473.98) Dollars.

I deny that the tax so levied by the said Board of Assessment and Equalization was based upon the gross earnings of said Wells Fargo & Company within the State of South Dakota, or that it was
22 based upon the amount of money paid by the said company to the railroad companies, but I am informed and believe, and therefore allege it to be a fact, that the said State Board of Assessment and Equalization made its assessment of the property

of said Express Company according to its value, and that said State Board of Assessment and Equalization took into consideration the amount of gross earnings of said company within the state for the year ending April 30th, 1910, as well as other information obtainable by said Board in order to enable them to place a just and fair value upon the property of said company, and that the assessment so made against the property of the said Wells Fargo & Company was a true and just value of the property belonging to said Company within the State of South Dakota for the year ending April 30th, 1910.

That the value of the [tan-ible] property of the said express company was determined by taking into consideration its capacity and adaptability for the work of conducting an express business, and taking into consideration its value as a part of the entire line of Wells Fargo & Company, and not as a segregated portion thereof, and that the gross earnings of said company were used only together with all other information obtainable, to aid the Board of Assessment and Equalization in arriving at a just and true valuation of the property of said company within this state when considered in connection with the uses to which it was put, and the fact that it was a part of a highly valuable system, and that the value so placed upon the property of the Wells Fargo & Company within this state was only a fair, just and equitable valuation.

I deny that the property of the said express company is assessed at more than its true and actual value in money, and

I deny that such tax amounts to more, in proportion, than the tax paid by other associations, partnerships or corporations or natural persons upon their property within the State of South Dakota.

I allege that the method adopted by the said Board of Assessment and Equalization in taxing property of Wells Fargo & Company within the State of South Dakota was the same method that was employed by said Board in taxing the property of all the other express companies doing business within the State of South Dakota at the same time, and that a fair and just valuation was sought to be, and was placed upon the property of Wells Fargo & Company so that it should be accorded the equal protection of the laws.

23 This defendant denies all fraud, and all manner of unlawful combination and confederacy or wrongdoing wherewith he is, and the members of the State Board of Assessment and Equalization *was*, by the Bill charged; and avers that the plaintiff, Wells Fargo & Company, has been guilty of fraud and of a wilful disregard of the Fifth Sub-division of Section 16 of Chapter 64 of the laws of 1907 of the State of South Dakota in this, that it failed to report to the State Auditor the gross earnings of the total business of such company transacted within this state for the year ending April 30th, 1910, and the value of all the property of such company used in this state during said year.

As to any facts alleged in the Plaintiff's Bill of Complaint which *is* not herein specifically admitted or denied, the defendant says that he does not know; that he has not sufficient information thereof, upon which to form a belief, and therefore denies the same and demands strict proof thereof.

The defendant therefore avers that the plaintiff does not come into court with clean hands. All of which matters and things herein set forth this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly prays to be dismissed with his reasonable costs and charges in his behalf most wrongfully sustained.

GEORGE G. JOHNSON,
As Treasurer of the State of South Dakota, Defendant.

L. T. BOUCHER,
Solicitor for Defendant.

ROYAL C. JOHNSON,
Attorney General of South Dakota, Of Counsel.

Endorsed: Filed in the Circuit Court on April 19, 1911.

(*Replication.*)

The Replication of Wells Fargo & Company, Plaintiff, to the Answer of the Defendant George G. Johnson as Treasurer of the State of South Dakota.

This repliant, saving and reserving unto itself, now and at all times hereafter, all and all manner of benefit and advantages of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true certain and sufficient in law to be answered unto, and that
24 the said answer of the defendant is uncertain, untrue and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

CHARLES W. STOCKTON,
Of Counsel.

Endorsed: Filed in the Circuit Court on June 5, 1911.

Statement of Evidence.

The above entitled action was duly brought on for trial before the court in the city of Sioux Falls in said Southern Division of the District of South Dakota on the 19th day of February, A. D. 1913

before the Honorable James D. Elliott, District Judge, Presiding and the plaintiff appearing by Messrs. Bailey & Voorhees, its solicitors, and the defendant appearing by L. T. Boucher, Esq., and Royal C. Johnson, Attorney General of the State of South Dakota, his solicitors. The following proceedings were had.

Plaintiff's Evidence.

The plaintiff introduced in evidence the following stipulation as the testimony of Grover B. Simpson and H. B. Anderson, said stipulation having been duly entered into by both parties upon the 9th day of September, 1912.

"It is hereby stipulated in the above entitled action by and between the parties thereto as follows, to-wit:

First. That Grover B. Simpson, if called and sworn to testify in the above entitled suit upon the part of the plaintiff would testify that he is the general superintendent of the plaintiff, Wells Fargo & Company, residing at the City of Chicago, in the state of Illinois, and having charge of the business and property of the Plaintiff, Wells, Fargo & Company, situated in the state of South Dakota, and was such general superintendent and had such charge of the property of Wells Fargo & Company at all times since the first day of May, 1909; that the annual statement of Wells Fargo & Company for the year ending April 30th, 1910, set up in the bill of
25 complaint herein as having been filed by Wells Fargo & Company with the State Auditor of the state of South Dakota on or about the first day of July, 1910, was prepared by and under his direction and that the same is a true, correct and complete statement of all of the matters and things therein purported to be contained; that during the year ending April 30th, 1910, and upon the first day of May, 1910, Wells Fargo & Company had no property within the state of South Dakota other than is set forth in said statement under the [hear] of "Office Furniture, Fixtures and Real Estate;" that the value of said property as stated in said report is the full and true value in money of said property at all times during the year ending April 30th, 1910, and upon the 1st day of May, 1910, and that all of the statements contained in said report were and the same are true in substance and in fact; that Wells Fargo & Company by its contract with the Chicago, Milwaukee & St. Paul Railway Company and with the Chicago, Milwaukee & Puget Sound Railway Company, in force during the year ending April 30th, 1910, paid to said Railway Companies fifty-five per cent (55%) of the gross earnings from the express business transacted over the lines of said Railway Companies and had the contract with said Railway Companies for the transaction of all of the express business over the various lines of said Companies; that said Railway Companies operated lines of railroad in the States of Illinois, Wisconsin, Minnesota, Iowa, North and South Dakota, Missouri, Wyoming, Montana, and Washington and various other of the states of the United States, and that in the reports of said Railway Companies filed with the State Auditor of the State of South Dakota of the

business transacted by said Railway Companies for the year ending April 30th, 1910, the amount reported as having been received from the plaintiff for express service was determined by dividing the total amount paid to said Railway Companies by plaintiff for express service over all the lines of railroad of said Railway Companies proportionately not to the business transacted in each state, but to the mileage in the several states; that the amount returned by said Railway Companies as having been paid for express service in the state of South Dakota was not the amount paid by the plaintiff for the express service rendered to it in the state of South Dakota, but was the proportion of the total amounts paid for express service over the lines of said Railways which the mileage of said Railways in the State of South Dakota bore to the entire mileage of said Railway Companies; that the amounts paid by the other express companies transacting business in South Dakota to the Railway Companies for express service varied in the case of each express company from fifty to fifty-five per cent of the gross earnings, and that the
26 amounts received by the Railway Companies from each express company for express service in the state of South Dakota was determined not from the earnings in South Dakota, but upon a mileage basis the same as in the case of Wells, Fargo & Company.

Second. It is further stipulated that upon the trial of this suit the foregoing statement of what the said Grover B. Simpson would testify to, if called and sworn as a witness herein, may be introduced as the testimony of the said Grover B. Simpson herein, and may be considered by the court the same as if the said Grover B. Simpson had been duly called and sworn and his testimony taken herein by deposition or before a master appointed to take the same or before the Court.

Third. It is further stipulated that H. B. Anderson, if called and sworn as a witness upon the part of the Plaintiff would testify that he is the State Auditor of the State of South Dakota, and as such State Auditor has Charge of the records in the office of the State Auditor of the State of South Dakota; that among the records in his office is the annual statement of Wells Fargo & Company for the year ending April 30th, 1910; that the copy of said statement set up in the bill of complaint in this suit is a true, correct and complete copy of said statement as the same is on file in the office of the said State Auditor; that there are also on file in his said office the reports of the various railroad companies transacting business with the State of South Dakota for the year ending April 30th, 1910, and the reports of the various express companies so transacting business in said state for said year ending April 30th, 1910; that the report of the Chicago, Milwaukee & St. Paul Railway Company for the year ending April 30th, 1910, showed that the express business over its lines in the state of South Dakota was transacted by Wells Fargo & Company, and that there had been paid to said Railway Company by said Wells Fargo & Company for the year ending April 30th, 1910, for express service, the sum of $173,373.27; that the report of the Chicago, Milwaukee & Puget Sound Railway Company for the year ending April 30th, 1910, showed that the Plaintiff had

transacted the express business over its lines of railroad in South Dakota and had paid to it for the year ending April 30, 1910, the sum of $7,800.45; that said sums aggregating $181,173.72 were the only sums paid by Wells Fargo & Company to any railroad company in the state of South Dakota for express service during the year ending Aprid 30th, 1910, and that the lines of the Chicago, Milwaukee & St. Paul Railway Company and of the Chicago, Milwaukee & Puget Sound Railway Company were the only lines of railroad over which the plaintiff conducted an express business in South
27 Dakota during the year ending April 30th, 1910; that besides the plaintiff, the other express companies which were transacting business in South Dakota for the year ending April 30th, 1910, were the American Express Company, the United States Express Company, the Great Northern Express Company, the Western Express Company and the Adams Express Company; that each of said express companies made reports to the auditor of the State of South Dakota of its business transacted within the state of South Dakota during the year ending April 30th, 1910, and of the value of its office furniture, fixtures and real estate within the state of South Dakota, of the number of miles operated within said state, of the number of offices within said state and of its total gross earnings for business transacted within said state; that the report of the American Express Company shows a total value of its office furniture, fixtures and real estate within the state of South Dakota on May 1st, 1910, to be $9,151.73 and its gross earnings within the state of South Dakota for the year ending April 30th, 1910, to be $88,181.44; that the report of the United States Express Company showed its office furniture, fixtures and real estate within the state of South Dakota to be of the value of less than $2,000; that the report of the Western Express Company showed the value of its office furniture, fixtures and real estate within the state of South Dakota to be less than the sum of $500; that the report of the Adams Express Company showed its office furniture, fixtures and real estate within the state of South Dakota to be of the value of less than $6,000; that the reports of the various railroad companies transacting business within the state of South Dakota showed that there were paid to the railroads by the several express companies for express service furnished during the year ending April 30th, 1910,

American Express Company, ...	$120,689.56
Great Northern Express Company, ...	6,626.47
United States Express Company, ...	6,812.22
Western Express Company, ...	1,507.28

That the report of the Minneapolis & St. Louis Railroad Company showed a payment for express service for the year ending April 30th, 1910, by the Adams Express Company of $4,645.60, and that the report by the Minnesota, Dakota & Pacific Railroad Company showed a payment by the said Adams Express Company for such express service of $12,219.73; that the only other railroad over which the said Adams Express Company transacted business for the year ending April 30th, 1910, was the Chicago, Burlington

& Quincy Railroad Company, and that in the report of the said Chicago, Burlington & Quincy Railroad Company there is not shown the amount claimed by said Railroad Company to be paid
28 to the Adams Express Company for express service in the state of South Dakota during the year ending April 30th, 1910, but that the amount so paid together with other items was reported by said Railroad Company at the sum of $68,409.96; that he is a member of the State Board of Assessment and Equalization of the state of South Dakota; that said Board of Assessment and Equalization placed an assessment upon the property of the Plaintiff, Wells Fargo & Company, for the year 1910 of $289.877 and levied a tax of 28 mills upon the corporate property assessed by it for the year 1910, which in the case of plaintiff amounted to the sum of $8,116.56; that said Board placed an assessment upon the property of the American Express Company of $193,260 and levied a 28 mill tax thereon of $5,411.28; that said Board placed an assessment upon the property of the United States Express Company for the year 1910 of $10,899 and levied a tax of 28 mills thereon amounting to $305.17; that said Board assessed the property of the Great Northern Express Company for the year 1910 at $11,278 and levied a tax of 28 mills thereon amounting to $315.78; that said Board assessed the property of the Western Express Company for the year 1910 at the sum of $2262 and levied a 28 mill tax thereon amounting to $63.34; and that said Board assessed the property of the Adams Express Company for the year 1910 at the sum of $71,632 and subsequently upon protest being made by the said Adams Express Company, reduced said assessment to the sum of $40,000 and levied a tax of 28 mills thereon, amounting to $1120; that all of said assessments were made by the said State Board of Assessment and Equalization at its meetings in July and August in the year 1910.

Third. It is further stipulated that the foregoing statement of what H. B. Anderson will testify to, if called and sworn as a witness in this action, may be introduced in evidence upon the trial thereof and considered by the court as being the deposition of said H. B. Anderson, and shall have the same force and effect as if it were his deposition duly taken herein or his testimony duly given before a master or before the court.

It is further stipulated that at the trial either party may interpose objections to any part of the evidence herein on the ground that it is incompetent, irrelevant or immaterial."

After introducing in evidence the foregoing stipulation as to the testimony of Grover B. Simpson and H. B. Anderson, the plaintiff rested.

29

Defendant's Evidence.

The defendant offered in evidence stipulation entered into October 10, 1912, as to the evidence of John Hirning, The Plaintiff objected to the evidence of the witness John Hirning as to the transactions of the State Board of Equalization of the State of South

Dakota as irrelevant, immaterial and incompetent and that the said John Hirning was a member of the State Board of Assessment and Equalization of the State of South Dakota and is not competent, as a witness to testify to the acts of said Board or as to the motives or influences which prompted its action in making an assessment upon the property of Wells Fargo & Company for the year 1910, and in that all evidence of a member of the State Board of Assessment and Equalization is incompetent to vary the record of its proceedings or to explain the motives or influences operating upon the minds of the members of the Board.

The COURT: The evidence is received subject to the objection.

The Stipulation as to the evidence of John Hirning was as follows:

"It is hereby stipulated in the above entitled action by and between the parties hereto as follows, to-wit:

That John Hirning, if called and sworn to testify in the above entitled suit upon the part of the defendant, will testify that for the years 1907 and 1910 inclusive, he was the duly elected, qualified and acting State Auditor in and for the State of South Dakota; that during said time he was under the laws of this state, a member of the State Board of Assessment and Equalization whose duty it was under the Act of March 7th, 1907, and prior laws, annually to assess all the property of every express company doing business in this state and used in the operation and maintenance of its business.

That long prior to the 30th day of April, 1910 he, as such State Auditor, furnished to the plaintiff a blank form entitled on the back "Annual Statement of the —— Company to the State Board of Assessment and Equalization of the State of South Dakota under authority of an Act entitled "An Act Providing for the assessment and taxation of the Property of Railroads, Telegraph, Telephone, Express and Sleeping Car Companies, Session Laws, 1907 for the year ending April 30th, 1910."

That said blank was ruled under convenient columns at the top of which were printed the words "Number of employees, number of offices, value office furniture, fixtures and real estate, number of miles operated, number cars owned and operated, number cars leased and operated, total gross earnings, total value of all property."

That the plaintiff company in its said report for the year ending April 30th, 1910, as is shown by said report, failed to fill out or make any statement or estimate, or give any figures or information whatever under the head of "Total value of all Property"; neither did said company at any other place, or at any other column of its report give any figures, make any statement, or give any estimate purporting to be the total value of all its property or of the total value of all its property used by it in this state, or any statement whatever purporting to show or estimate the total value of its property in this state or elsewhere.

That neither he nor the State Board of Assessment and Equalization obtained from the plaintiff company any statement or estimate, other than its report aforesaid, touching the total value of all the

property of said company used in this state, and that the board of Assessment and Equalization of necessity went elsewhere to obtain such information; that it had information, found in the annual reports from the plaintiff company to the Board of Railroad Commissioners of South Dakota, and information from the reports of the railway companies doing business in this state to the Board of Railroad Commissioners of this state, and information otherwise obtained. That in making the assessment for the year 1910, upon the property of the plaintiff company in this state, he, and as he believes, the other members of the said State Board of Assessment and Equalization, considered, among other things, the reports and annual statements of the plaintiff company, the reports of the railway companies doing business in this state, the reports and records of the Board of Railway Commissioners of this state, the contracts for express privileges of the plaintiff within this state, the earnings of the plaintiff company in this state, the business done by the company in this state, in so far as he and the said Board were able to ascertain the earnings of the said company in this state, the length of the plaintiff's system of mileage in this state, the number of its offices in this state, the value of its furniture and fixtures, horses, wagons, safes, and the amount of money which, in the judgment of the witness and the other members of the Board, must have been necessary to carry on the various lines of the said company's business in this state, and all other things which he or the members of said Board could obtain tending to throw light upon
31 the question of the total value of the plaintiff's property in this state, tangible and intangible.

That neither the witness nor the other members of the Board, as he believes, were ever able to ascertain exactly either the total value of the plaintiff's property in this state, or the total income of the plaintiff's earnings in this state, or the total net income of the plaintiff's earnings in this state; that the plaintiff in its said statement to the Auditor's office, did not purport to report any horses, vehicles, stable equipment or transportation equipments whatever in the state of South Dakota, although its report for the same year to the Board of Railway Commissioners in this state shows at page 29 that it had over $1,136,085 worth of such property somewhere on its lines inside or outside of this state, a part of which was personally known to the witness and the other members of the said Board, located in South Dakota.

That in its said annual statement to the Auditor's office, as shown by said statement, the plaintiff did not report its income in this state derived from operations other than transportation, while its report for the same year 1910 to the said Board of Railway Commissioners on page 37 showed that it derived revenues on its entire lines inside and outside of the state of South Dakota from operations other than transportation, viz: from brokerage fees, commission department, money orders, travelers' cheques, C. O. D. cheques, telegraphic transfers, letters of credit and other revenue financial departments miscellaneous, the sum of $458,192.06, of which $149,214 was derived from the sale of domestic money orders and over $231,000 of which was

derived from C. O. D. cheques. Just what proportion of this money was earned in South Dakota, or just what amount of money was used by the plaintiff in South Dakota in the carrying on of its banking exchange business, the Board of Assessment and Equalization was unable to ascertain, but the members of the Board, as well as the witness, knew personally, and from information obtained satisfactory to the Board, that these lines of business, other than transportation, had been carried on by the plaintiff in this state, and that large sums of money, must have been used by the plaintiff in this state necessary in the carrying on of such lines of business.

The report of the plaintiff for the said year 1910 made to the Board of Railroad Commissioners of this state showed that for the year ending June 30th, 1910, the plaintiff had sold, money orders, checks, letters of credit and other forms of remittance paper
32 over its entire system to the number of 3,287,449 covering a face value of $40,269,939. This statement of the plaintiff appears at page 63 of its report to the Board of Railway Commissioners.

But just how much income the plaintiff derived in South Dakota from the sale of such orders and checks the members of the Board of Assessment and Equalization were unable to exactly ascertain and could only make estimates from the best information they could obtain.

Said report showed that the plaintiff, Wells Fargo & Company, did not own or claim to own any real estate in South Dakota.

That the said State Board of Assessment and Equalization did not assess the plaintiff company upon its total gross income or its total net income derived from its business in this state or in the state and elsewhere; that the said Board of Assessment and Equalization could not have made an assessment upon the plaintiff based upon its income either net or gross if it had desired to do so, or had intended to do so, or had made any agreement so to do, because of the fact that it was impossible for the Board of Assessment and Equalization to ascertain and it did not ascertain the total income of the plaintiff company in this state for the year, or for any other year, or its net income for said year or any other year, and this condition of affairs arose because of the facts above stated, and because of the failure of the plaintiff to give either to the State Auditor's office or to the Board of Assessment and Equalization, or the Board of Railroad Commissioners any statement or estimate of the amount of its earnings in South Dakota from its banking exchange business such as money orders, checks, letters of credit and so forth, and its statement, contained in its annual statement to the Auditor's office, wherein it purported to give its total gross earnings, did not include its earnings from its banking business, checks, credit business or any business outside of the transportation business.

As a part of the testimony of this witness the defendant offers in evidence the annual statement of Wells Fargo & Company to the State Board of Assessment and Equalization of South Dakota for the year ending April 30th, 1910, and also the pages referred to by him of the annual report of Wells Fargo & Company to the Board

of Railroad Commissioners of the state of South Dakota for the year ending April 30th, 1910.

33 That the property of the plaintiff, Wells Fargo & Company, was assessed by the said State Board of Assessment and Equalization for the year 1910 at $289,878, while the property of the American Express Company was assessed at $193,260. That the annual statement of the plaintiff company for the year 1910 showed that it had 1621 miles of system in South Dakota, while the report of the American Express Company for the same year showed that it had only 1363 and a fraction miles of system in South Dakota; that the Wells Fargo Company also had more offices in the state than the American Express Company had; that according to the annual statement of the two companies for that year, the value of the office furniture and fixtures and real estate of the Wells Fargo Company was fixed by it at $18,473.98, while the value of the office furniture, fixtures and real estate of the American Express Company was fixed by its report for the same year in its said annual statement at $9,151.73.

That witness entered into no contract, agreement or conspiracy with the other members of the Board of Assessment and Equalization in 1909, or at any other time, to disregard the value or amount of the plaintiff's property in making the assessment for the years 1910 or 1909, and that he never at any time while he was a member of the Board of Assessment and Equalization entered into any agreement or contract or conspiracy or understanding with the other members of the State Board of Assessment and Equalization, or any of them, to disregard the property or the value of any of the property of the Plaintiff company, and to assess the plaintiff company upon its income either gross or net, and he knows of no such an agreement, contract, [undertaking] or conspiracy and believes there was none, but that he, as well as the other members of said Board earnestly endeavored to obtain what information they could to ascertain the true value of the plaintiff's property in this state, tangible and intangible, and to make a just and equitable assessment of said property in the same ratio as the property of individuals; that the said State Board of Assessment and Equalization did, to the best of its ability, make a just and equitable assessment of said property in the same ratio as the property of individuals; that if a mistake occurred, it was because of the fact that the plaintiff neglected to furnish the said State Board with its own estimate of the total value of its property in this state or used by it in this state.

It is further stipulated that upon the trial of this case the foregoing statement of what said John Hirning will testify to, if called

34 and sworn as a witness herein, may be introduced as the testimony of the said John Hirning, and may be considered by the court the same as if the said John Hirning had been duly called and sworn and his testimony taken herein by deposition, or before a master appointed to take the same, or before the court; provided, however that either party hereto may interpose objections to any part of the foregoing testimony of the said John Hirning upon the ground that it is incompetent, irrelevant or immaterial, or that

the said John Hirning is incompetent to testify to the same, but objection will not be made that it is not the best evidence."

The Defendant offered in evidence stipulation as to the testimony of P. J. Murphy in lieu of the testimony of said P. J. Murphy, which stipulation was entered into by the parties on the 16th day of October 1912, and it is as follows:

"It is hereby stipulated in the above entitled action by and between the parties hereto as follows, to wit:

First.

That P. J. Murphy, if called and sworn to testify in the above entitled suit upon the part of the defendant, will testify that he is Deputy State Auditor in and for the State of South Dakota.

Second.

That at the request of Counsel for the defendant in the above entitled case, he has made some examination of the reports of the express companies and the railroad companies doing business in South Dakota, made by them to the Board of Assessment and Equalization of this state, and to the Board of Railroad Commissioners of this state, and that, among other things, said reports show the following facts:

That the Wells Fargo Express Company does its business in this state over the Chicago, Milwaukee & St. Paul and over the Chicago, Milwaukee & Puget Sound Railroads.

That the annual report of Wells Fargo & Company the plaintiff above named, for the year 1910, made to the Board of Railroad Commissioners of this state, shows at page 39 that the plaintiff express company paid to the said railroad companies 55% of its gross receipts arising from business transacted over the lines of said railroads.

The same report at page 63 shows that the plaintiff over all of its lines, both inside and outside the state of South Dakota, sold
35 for the year 1910, 3,287,449 money orders, travelers' cheques, C. O. D. cheques and telegraphic transfers of the face money value of $40,269,939.43.

Mr. BAILEY: Plaintiff objects to the testimony in regard to the sale of money orders, tarvelers' checks, etc., as irrelevant and immaterial.

The COURT: Received subject to the objection.

That at page 29 the same report shows that the capital stock of the plaintiff was $24,000,000 in 1910, and that its dividend rate for the year was 310%."

Mr. BAILEY: Object to testimony in regard to amount of capital stock in 1910 of the Wells Fargo & Company, or its dividend rate, as irrelevant and immaterial.

The COURT: Received subject to the objection.

"That the statement on page 19 of the plaintiff's report, showing the dividend rate to be 310%, conflicted with the further statement

of the same report on the same page, which shows the total amount of dividends paid for the year to be $25,598,370."

Mr. BAILEY: Object to the total amount of dividends as irrelevant, immaterial, not the best evidence.

The COURT: That is clearly incompetent. Sustained.

"That the amount of dividends actually paid for the year 1910, as shown by the statement contained in the report of Henry Clews & Company, was $74,400,000.

That the sworn report of the C. M. & St. P. and the C. M. & Puget Sound Railroads for the year ending April 30th, 1910, made to the South Dakota Board of Railroad Commissioners under Schedule F. shows the following amounts as gross earnings in South Dakota from express service paid to the said railroad companies by the Wells Fargo Express Company, viz:

C. M. & St. P.	$173,373.27
C. M. & Puget Sound	7,800.45
Total	$181,173.72

That the report of the Wells Fargo Express Company for the year ending June 30th, 1910, made to the Board of aRilroad Commissioners of South Dakota shows at page 39 that 55% of the gross receipts of the business transacted over their lines was paid by Wells Fargo & Company to the C. M. & St. P. and the C. M. & Puget
36 Sound Railroad Companies, which gross receipts included both the earnings from interstate and intrastate business.

That in its report to the state Board of Assessment and Equalization of South Dakota for 1910, the plaintiff reported its gross intrastate earnings for the year ending April 30th, 1910 to be the sum of $131,096.28.

That the annual report of the American Express Company to the Board of Railroad Commissioners of South Dakota for the year ending June 30th, 1909, at pages 36 and 37, states that the lines over which that Company operates in South Dakota are among others, the Chicago & Northwestern lines, the Illinois Central main line, the South Dakota Central, and the Wyoming & Missouri River, and that the basis of its, the American Express Company's, contract for express privilgees over said lines is as follows:

Over the Chicago & Northwestern, 45% on through traffic, 50% on local freight traffic; over the C. St. P. Minneapolis & Omaha, 45% on through freight traffic and 50% on local freight traffic; over the Illinois Central main line, 55% of gross receipts on all business originating at Chicago, destined to New Orleans, Omaha, Sioux City and Sioux Falls, or vice versa; over the Pierre Rapid City & Northwestern 45% on through traffic and 50% on local freight traffic; over the Rapid City, Black Hills & Western 45% of gross receipts; over the South Dakota Central, 45% of gross receipts.

Third.

It is further stipulated that upon the trial of this case, the foregoing statement of what the said P. J. Murphy will testify to, if called and sworn as a witness herein, may be introduced as the testimony of P. J. Murphy, and may be considered by the court the same as if the said P. J. Murphy had been duly called and sworn, and his testimony taken herein by deposition or before a master appointed to take the same, or before the court; provided, however, that at the trial, either party may interpose objections to any portions of said testimony of the said P. J. Murphy upon the ground of incompetency, of witness or testimony, irrelevance or immateriality, but objection will not be made that it is not the best evidence."

Close of Evidence for Defendant.

The foregoing, constituted all of the evidence presented upon the trial of this cause upon the part of both the plaintiff and the defendant.

37 The foregoing statement is hereby presented by the plaintiff pursuant to Rule 75 of the Rules of Practice for the Courts of Equity of the United States.

Dated July 17, 1913.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

CHARLES W. STOCKTON,
Of Counsel.

Endorsed: Statement of Evidence. Received from the appellant's Solicitors and Lodged in the Clerk's office this 17th day of July 1913, as per Rule 75. Oliver S. Pendar, Clerk. Bailey & Voorhees, Sioux Falls, S. D.

Approved Aug. 1st, 1913.

JAS. D. ELLIOTT, *Judge.*

Filed August 1st, 1913. Oliver S. Pendar, Clerk.

Decree.

In the District Court of the United States for the District of South Dakota, Southern Division, April Term, 1913.

No. 628.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant.

This cause came on to be heard at a regular term of the above named Court at the court room in the city of Sioux Falls, South Dakota on the 19th day of February, A. D. 1913, Mr. C. O. Bailey,

Chas. W. Stockton, of Counsel, appearing for the plaintiff, and L. T. Boucher, Royal C. Johnson, Attorney General, of Counsel, appearing for the defendant, and the Court having listened to the evidence offered and the arguments of Counsel, and having fully considered the same, and having made and filed its decision in writing.

It is Ordered, Adjudged And Decreed, that the Plaintiff take nothing by this action; that the plaintiff's prayer for the Writ of Injunction is denied; that the temporary injunction herein, heretofore issued against the defendant is dissolved; that the plaintiff's bill of complaint is dismissed for want of equity, and the defendant have execution for his costs herein to be taxed by the Clerk.

The Court does further order, adjudge and decree that the temporary injunction heretofore issued in this cause and intended to cover the tax assessment for the year 1910 shall be continued
38 in force for the period of 90 days from this date, and thereafter until final disposition of the cause on appeal, if within said period of 90 days the plaintiff shall duly perfect and appear herein by filing herein a petition for appeal and an assignment of errors and giving an appeal bond in the penal sum of ten thousand dollars ($10,000) with surety thereon to be approved by the court; otherwise said temporary injunctions herein shall stand dissolved at the end of said 90 days' period.

It Is Further Ordered, Adjudged, And Decreed; that all proceedings towards the collection of the costs herein be stayed during said 90 day period and during said appeal.

Done in open court this 28 day of April, A. D. 1913.

By the Court:

JAS. D. ELLIOTT, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk.*

Endorsed: Filed in the District Court on April 28, 1913.

(Petition for and Order Allowing Appeal.)

The above named plaintiff conceiving itself aggrieved by the decree made and entered on the 28th day of April, 1913, in the above entitled cause does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said order and decree was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

CHARLES W. STOCKTON,
Of Counsel.

Dated at Sioux Falls, South Dakota, July 15th, 1913.

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The foregoing petition for appeal is granted and the claim of appeal therein made is allowed.

Done in open court this 16 day of July, 1913.

JAS. D. ELLIOTT,
District Judge of the District Court of the United States for the District of South Dakota.

Endorsed: Filed in the District Court on July 17, 1913.

39 (*Assignment of Errors.*)

Now comes the plaintiff above named and files the following assignment of errors upon which it will rely in its appeal from the decree made by this Honorable Court on the 28th day of April, 1913, in the above entitled cause, and says that there is manifest error in the proceedings and decree of the District Court of the United States for the District of South Dakota, Southern Division, and that the court erred therein in the following particulars, to-wit:

1. In deciding that Chapter 64 of the Laws of South Dakota 1907 relating to the assessment and taxation of the property of express companies is a valid and constitutional enactment.

2. In deciding that the act of the Legislature of the State of South Dakota providing for the assessment and taxation of the property of railway, telegraph, telephone, express and sleeping car companies approved March 7, 1907, and known as Chapter 64 of the Laws of South Dakota 1907, is not in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States or with any other provisions of the Constitution of the United States.

3. In deciding that the Act of the Legislature of the State of South Dakota entitled an Act providing for the Assessment and Taxation of the property of railway, telegraph, telephone, express and sleeping car companies approved March 7, 1907, and known as Chapter 64 of the Laws of South Dakota, 1907, is not in conflict with Sections 2, 9 and 10 of Article 11 of the Constitution of the State of South Dakota.

4. In deciding that the Act of the Legislature of the State of South Dakota entitled An Act Providing for the Assessment *of* Taxation of the Property of Railway, Telegraph, Telephone, Express and Sleeping Car Companies approved March 7, 1907, and commonly known as Chapter 64 of the Laws of South Dakota 1907, is not in conflict with Section 2 of Article 6 of the Constitution of the State of South Dakota.

5. In deciding that the Act of the Legislature of the State of South Dakota entitled An Act providing for the Assessment and Taxation of Property of Railway, Telegraph, Telephone, Express and Sleeping car companies approved March 7, 1907, and commonly known as Chapter 64 of the Laws of South Dakota of 1907 is not in conflict with Section 21 of Article 3 of the Constitution of the State of South Dakota.

6. In deciding that the action of the State Board of Assessment

& Equalization of the State of South Dakota in making the
40 assessment for the year 1910 upon the property of the plaintiff in the state of South Dakota was not in violation of Sec-1 of the Fourteenth Amendment to the Constitution of the United States.

7. In deciding that by the method of procedure adopted and followed by the State Board of Assessment & Equalization of the State of South Dakota in making the assessment upon the property of plaintiff for the year 1910 and levying a tax thereon plaintiff was not deprived of its property without due process of law and was not denied the equal protection of the laws in violation of the provisions of the Constitution of the United States guaranteeing such respective rights.

8. In deciding that the act of the State Board of Assessment & Equalization of the State of South Dakota in making the assessment and tax levy upon the property of plaintiff for the year 1910 was not in violation of Sections 2, 9 and 10 of Article 11 of the Constitution of the State of South Dakota.

9. In deciding that the act of the State Board of Assessment & Equalization of the State of South Dakota in making the assessment and tax levy upon the property of plaintiff in the State of South Dakota for the year 1910 was not in violation of Section 2 of Article 6 of the Constitution of the State of South Dakota.

10. In deciding that the assessment of plaintiff for the year 1910 was made by the State Board of Assessment & Equalization of the State of South Dakota at the time and in the manner provided by statute.

11. In deciding that upon the face of the record in this case it appears that the property of plaintiff was valued for assessment in the manner provided by law.

12. In deciding that under the evidence in this case it does not appear that the assessment upon the property of plaintiff in the state of South Dakota for the year 1910 was made by the State Board of Assessment & Equalization upon such a basis as to realize a tax of two and one-fourth per cent upon the gross income or of four and one-half per cent upon the net income of plaintiff thus constituting the tax a gross earnings tax and not an ad valorem tax.

13. In deciding that under the evidence the court would not be justified in finding or imputing fraud or bad faith on the part of the State Board of Assessment & Equalization of the State of South
Dakota in making the assessment and tax levy upon plain-
41 tiff for the year 1910 and that the error of said Board if any was an error of judgment unmixed with fraud in making an excessive valuation of the property of plaintiff in the state of South Dakota.

14. In deciding that under the averments of the bill of complaint herein, the proofs and the admissions in the answers and stipulations filed that the question of the value of the property of plaintiff in the state of South Dakota was and is a question exclu-

sively for determination by the South Dakota State Board of Assessment & Equalization.

15. In deciding that by the method used by the State Board of Assessment & Equalization of the State of South Dakota in making the assessment and levying the tax upon the property of plaintiff for the year 1910 and plaintiff was not assessed at more than fifteen times the true and actual value of its property in money.

16. In deciding that the State Board of Assessment & Equalization of the State of South Dakota possessed the right in making the assessment upon the property of plaintiff for the year 1910 to take into consideration the business transacted by plaintiff in the state of South Dakota or its gross or net income or any fact beyond the value of the property of plaintiff in the state of South Dakota on the 1st day of May, 1910.

17. In deciding that under the pleadings in this suit and the proofs and stipulation herein it appears that any legal assessment of the property of plaintiff was made by the State Board of Assessment & Equalization of the State of South Dakota for the year 1910.

18. In deciding that the acts of the State Board of Assessment & Equalization of the State of South Dakota in making the assessment upon the property of plaintiff for the year 1910 were not fraudulent in law and in fact and that such fraud did not vitiate the assessment made upon the property of plaintiff.

19. In not deciding that the act of the Legislature of the State of South Dakota providing for the assessment and taxation of the property of railway, telegraph, telephone, express and sleeping-car companies approved March 7, 1907, and known as Chapter 64 of the Laws of South Dakota of 1907 was and is invalid for that (*a*) it is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and (*b*) it is in contravention of the eighth section of Article 1 of the Constitution of the
42 United States in respect of the power to regulate commerce among the several states.

20. In not deciding that the act of the Legislature of the State of South Dakota providing for the assessment and taxation of the property of railway, telegraph, telephone, express and sleeping car companies approved March 7, 1907, and commonly known as chapter 64 of the laws of South Dakota of 1907, was and is invalid and unconstitutional for that (*a*) it is in contravention of Sections 2, 9 and 10 of Article 11 of the constitution of the State of South Dakota, (*b*) it is in contravention of Section 2 of Article 6 of the Constitution of the State of South Dakota, and (*c*) it is in contravention of Section 21 of Article 3 of the Constitution of the State of South Dakota.

21. In not deciding that under the pleadings and proofs the State Board of Assessment & Equalization of the State of South Dakota had in assessing the value of the property of plaintiff in South Dakota included the value of property the situs of which was without the state of South Dakota and beyond the jurisdiction of said Board to assess and that said assessment was therefore void in toto and should be set aside by the Court.

22. In not deciding that the State Board of Assessment & Equalization in making an assessment upon the property of plaintiff for the year 1910 could legally take into consideration only the value of the property owned by plaintiff in the state of South Dakota on the 1st day of May, 1910.

23. In not deciding that under the pleadings and proofs in this suit the State Board of Assessment & Equalization of the State of South Dakota fraudulently and illegally made an assessment upon the property of plaintiff many times in excess of the real and actual value of all property of the plaintiff within the state of South Dakota and subject to assessment for the year 1910.

24. In deciding that the action of the State Board of Assessment & Equalization of the State of South Dakota in making the assessment upon the property of plaintiff for the year 1910 was conclusive and that the court possessed no power to review the same.

25. In deciding and decreeing that the bill of complaint should be dismissed for want of equity and in not deciding and decreeing that the complainant was entitled to relief as prayed in said bill.

43 In order that the foregoing assignment of errors may be and appear of record the complainant presents the same to the court and prays that such disposition be made there*with* as is in accordance with law and the statutes of the United States in such cases made and provided, and complainant prays a reversal of said decretal order and decree of dismissal made and entered by said court.

BAILEY & VOORHEES,
Solicitors for Plaintiff and Appellant.

CHARLES W. STOCKTON,
Of Counsel.

Endorsed: Filed in the District Court on July 17, 1913.

(*Bond on Appeal.*)

Know All Men By These Presents that we, Wells Fargo & Company as principal and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto George G. Johnson as Treasurer of the State of South Dakota, and unto his successors in office and unto the above named State of South Dakota in the sum of ten thousand dollars ($10,000) to be paid to the said State of South Dakota and to the said George G. Johnson as Treasurer of the said State of South Dakota, and unto his successors in office to which payment well and truly to be made we bind ourselves jointly and severally and our and each of our heirs, executors, and administrators and successors and assigns jointly by these presents.

Sealed with our seals and dated this 15th day of July, 1913.

The condition of the above obligation is such that whereas the

above named Wells Fargo & Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the decree rendered in the above entitled suit by the District Court of the United States for the District of South Dakota. Now therefore if the said Wells Fargo & Company shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void, otherwise to be and to remain in full force effect and virtue.

[SEAL.] WELLS FARGO & COMPANY,
By BAILEY & VOORHEES,
Its Attorneys.

[SEAL.] UNITED STATES FIDELITY & GUARANTY CO., BALTIMORE, MD.,
By W C. HOLLISTER AND
W. H. LYON, *Its Attorneys in Fact.*

44 United States Fidelity and Guaranty Co.

Home Office, Baltimore, Md.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Be it Known, that on this 15th day of July, 1913, before me the undersigned a notary public, of the state of South Dakota, in and for the County of Minnehaha personally appeared W. C. Hollister and W. H. Lyon, known to me to be the Attorneys in fact of the United States Fidelity and Guaranty Company the corporation that is described in and that executed the within undertaking and acknowledged to me that such corporation executed the same.

I further certify that there was exhibited to me the original certificate of authority issued by the Commissioner of Insurance of the State of South Dakota, to said United States Fidelity and Guaranty Company, and that the following is a full true and complete copy of such certificate.

Company's Certificate of Authority.

Whereas, the United States Fidelity and Guaranty Company, a corporation organized under the laws of Maryland, has filed in this office a sworn statement exhibiting its condition and business for the [—] ending December 31st, 1912, conformable to the requirements of the laws of this State regulating the business of Insurance; and

Whereas, the said Company has filed in this office a duly certified copy of its charter, with certificate of organization, in compliance with the requirements of the Insurance Laws aforesaid;

Now, therefore, I, O. S. Basford, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above named Company is fully empowered through its authorized agents to transact its appropriate business of

Fidelity, Surety, Burglary, Employers' Liability and Title Guarantee Insurance in this State according to the laws thereof, until the 28th day of February, A. D. 1914.

In testimony whereof, I have hereunto set my hand and official seal at Pierre, this 1st day of March, A. D. 1913.

O. S. BASFORD,
Commissioner of Insurance.

45 Witness my hand and notarial seal the day and date first above written.

[SEAL.] W. G. HOLLISTER,
Notary Public.

This form is in compliance with paragraph 4, chapter 73, Laws of 1905.

The foregoing bond is approved this 16th day of July, 1913.

By the Court:

JAS. D. ELLIOTT, *Judge.*

Endorsed: Filed in the District Court on July 17, 1913.

(*Opinion.*)

In the District Court of the United States for the District of South Dakota, Southern Division.

No. 628. In Equity.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant.

No. 629.

JAMES C. FARGO, Individually and as President of the American Express Company, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant.

Messrs. Bailey & Voorhees, Sioux Falls, S. D., Solicitors for plaintiffs, and

L. T. Boucher, Esquire, Aberdeen, S. D., and Royal C. Johnson, Attorney General, Pierre, S. D., Solicitors for defendant.

ELLIOTT, *District Judge:*

These actions came on for trial before the Court on the 19th day of February, A. D. 1913, and were consolidated for the purpose of taking testimony and trial, though separate judgments are to be entered in them, and I will determine both cases.

The bills of complaint in the two cases are substantially alike. They allege in substance,

That Wells Fargo & Company is a corporation of the state of Colorado.

That James C. Fargo, individually and as president of the American Express Company is a resident of the state of New York.

46 That the said American Express Company is an unincorporated association or co-partnership of individuals, organized under articles of agreement between its members, under the common law of the state of New York, with its principal place of business in the city of New York, and that said company is composed of three thousand members owning one hundred eighty thousand shares in said company, or par value and a market value of one hundred dollars per share.

That all such members or shareholders have a joint ownership and interest in the cause of action therein stated and that they are too numerous to be joined as parties. That it is impractical to bring them all before the Court for the reasons stated in the bill of complaint and therefore that he, James C. Fargo, as such president and member or shareholder, brings the suit not only on his own behalf but on behalf of said company and each and all of its members.

That George G. Johnson was at the times named in the complaint treasurer of the state of South Dakota.

That the American Express and Wells Fargo & Company for a long time prior to the time named in the complaint had been and then were conducting the business of a common carrier, popularly and technically described as the express business, that is to say, the quick and safe transportation and transmission over public roads and highways by means of railways, steamboats, steamships and other public carriages, of moneys, bank bills, bonds, securities and packages containing articles of greater or less value as contradistinguished from ordinary freight, from points within the state of South Dakota to other points within the state, from points without the state to points within the state, and from points within the state to points without the state; also from foreign countries to the state of South Dakota; and that they do said business under contracts with railroad companies and other common carriers, owning and operating railroads, rolling stock, ships and other public conveyances.

It is further alleged that on the 7th day of March, 1907, there went into effect in the state of South Dakota, an act entitled "An Act Providing for the Assessment and Taxation of the Property of Railroad, Telegraph, Telephone, Express and Sleeping Car Companies," and has never been repealed, and that pursuant to said statute and especially to the provisions of section 16 thereof, the said American Express Company and Wells Fargo & Company, prior to the first day of July, 1910, filed in the office of the State Auditor their reports for the year ending April 30th, 1910, setting

47 forth copies of such annual statement, which said annual statement it is unnecessary to set forth in full herein in either

case, except to say that the statement of the American Express Company showed a total of 162 offices, the total value of office furniture, fixtures and real estate, $9,151.73, total number of miles operated, 3,383.55, and total gross earnings, $88,181.44.

It may be stated here that the report as made by said company fails to state the number of cars leased and operated or owned and operated, if any, by the company, and also fails to state the total value of all the property of such company used in the state of South Dakota, as required by the fifth paragraph of said section 16 of said law.

That the statement filed by the Wells Fargo & Company showed the total number of officers 156, total value of office furniture, fixtures and real estate $18473.98, total number of miles operated 1621.52, total gross earnings, $131096.28.

That the said statement did not contain any statement of the total number of express cars owned by such company and used within the state or the number of such express cars leased and controlled but not owned by such companies and used within the state, or operated under lease or contract in any manner, and it did not show the total value of all the property of such company used in the State of South Dakota, and neither of said reports gave any information with reference to the value of all the property of such companies used in the state of South Dakota as required by said statute. Which reports are duly verified and it was further alleged that the American Express Company upon the 1st day of May, 1910, owned no property other than that specified in said report, situated in or taxable in the state of South Dakota.

It is further alleged that pursuant to the provisions of the statutes of the state of South Dakota the State Board of Assessment and Equalization of said state of South Dakota, convened in regular annual session on the 5th day of July, 1910, and continued in session until the 10th day of August, 1910.

That upon the 27th day of July, 1910, said state Board of Assessment and Equalization fixed the valuation upon the property of said American Express Company for taxation for the year 1910 at $193,260, and that on the same date said State Board of Assessment and Equalization fixed a valuation upon the property of Wells Fargo & Company for the year 1910, at $289,877, and thereupon said State Board of Assessment adjourned to meet on the 10th day of August, 1910.

48 It is further alleged that on the 10th day of August, 1910, Wells Fargo & Company duly filed its protest with said Board of Assessment and Equalization of the State of South Dakota, against the assessment so made upon it, which protest is as follows:

"To the Honorable the State Board of Equalization of the State of South Dakota:

Wells Fargo & Company respectfully protests against the assessment made upon its property in South Dakota for the year 1910, for the following reasons:

First.

Said assessment is excessive and is many times the actual and true value of all of the property owned by Wells Fargo & Company and subject to assessment within the State of South Dakota.

Second.

Said assessment is excessive and out of all proportion to the assessments made upon the property of other corporations and of natural persons subject to taxation within the state of South Dakota for the year 1910.

Third.

In making said assessment the State Board of Equalization has followed an illegal and arbitrary method of ascertaining the value of the property of Wells Fargo & Company subject to taxation in South Dakota, for the year 1910.

Fourth.

In making said assessment the State Board of Equalization has unlawfully taken into consideration the interstate earnings of Wells Fargo & Company, and has in effect illegally taxed the same.

Wherefore, the said Wells Fargo & Company does respectfully pray that the said State Board of Equalization reconsider said assessment, and make an assessment upon the property of Wells Fargo & Company subject to taxation in South Dakota for the year 1910 no greater than the actual and true value of said property, and no greater proportionately than the assessments made upon other corporation and upon natural persons.

[Dates] August 6, 1910.

WELLS FARGO & COMPANY,
By BAILEY & VOORHEES,
Its Attorneys."

49 And on the same date and at the same time and place the American Express Company filed its protest in practically identical language.

It is further alleged that the said State Board of Assessment and Equalization of the state of South Dakota ignored said protests and said reports and adjourned sine die without changing the assessments so made as aforesaid upon the property of said express companies.

It is further alleged that the state Board of Assessment and Equalization of the state of South Dakota did at its said session in July and August, 1910, upon said assessed valuation of Wells Fargo & Company of $289,877 levy a tax against said company for the year 1910 of twenty eight mills, or $8116.56.

It is further alleged that the state Board of Assessment and Equalization of the state of South Dakota, did at its said session in July and August, 1910 upon said assessed valuation of the Ameri-

can Express Company of $193,260 levy a tax against said company for the year 1910 of twenty eight mills, or $5411.28.

It is alleged that neither the State Auditor of the state of South Dakota or the said Board of Assessment and Equalization, or any of its members, ever made any objection to the report above referred to, so furnished by said express companies, but that the same were received and accepted and filed by the State Auditor, and the same were presented before the State Board of Assessment and Equalization who received and accepted them and that no member of said board ever requested the [plaintiffs] or either of them to furnish any other or further information respecting their property and respecting the roads operated by them in addition to that contained in said reports.

The bills of complaint also allege that the matters and facts stated in said reports and in said protests are true.

The provisions of chapter 64 of the laws of the State of South Dakota of A. D. 1907 are then set forth in so far as the same refer to the payment of taxes so levied upon express companies, and the penalty that is provided in case of failure to pay within thirty days of the time the same become due, and the provision with reference to distraint of property of delinquent express companies for collection of said tax, etc.

It is alleged in the bill of complaint by Wells Fargo & Company

"That the said State Board of Assessment and Equalization
50 of the state of South Dakota in making said assessment upon the property of your orator in the State of South Dakota, and in levying a tax thereon, wilfully and fraudulently disregarded said report and said protest filed by your orator and wilfully and fraudulently disregarded the true and actual value of the property of your orator in the state of South Dakota; an- that said State Board of Assessment and Equalization arrived at said assessment and at said tax in the following manner, to-wit:

That said Board of Assessment and Equalization obtained from the reports of the various railroads transacting business in South Dakota over whose lines your orator conducted its express business, the amounts reported by said several railroads as severally paid to them for the year ending April 30th, 1910, by your orator as compensation for the carriage by said railroads of its express matters and ascertained from such reports that the amounts so paid were as follows, to-wit:

Chicago, Milwaukee & St. Paul Railway Company	$173,373.27
Chicago, Milwaukee & Puget Sound Railway Company	7,800.45
Total	$181,173.72"

It is alleged in the bill of complaint by the American Express Company "that the said State Board of Assessment and Equalization of the state of South Dakota in making said assessment upon the property of the American Express Company in the state of South Dakota, and in levying a tax thereon wilfully and fraudu-

lently disregarded said report and said protest filed by the said American Express Company and fraudulently and wilfully disregarded the true and actual value of the property of the said American Express Company in the state of South Dakota; that said State Board of Assessment and Equalization arrived at said assessment and at said tax in the following manner, to-wit: That said State Board of Assessment and Equalization obtained from the reports of the various railroads transacting business in South Dakota, over whose lines the said American Express Company conducted its express business, the amounts severally paid to such railroads for the year ending April 30th, 1910, by the American Express Company as compensation for the carriage by said railroads of its express matters and ascertained from such reports that the amounts so paid were as follows:

51	Chicago, & Northwestern Ry. Co., ...	$102,030.94
	Chicago, St. Paul, Minneapolis & Omaha Ry. Co., ...	7,210.60
	South Dakota Central Ry. Co., ...	2,096.32
	Rapid City, Black Hills & Western Ry. Co., ...	417.00
	Pierre Rapid City & Northwestern Ry. Co., ...	6,178.99
	Wyoming & Missouri River Ry. Co., ...	445.80
	Pierre & Ft. Pierre Bridge Co., ...	85.36
	Dubuque & Sioux City R. R. Co., ...	2,223.85
	Total	$120,689.56"

It is thereupon alleged in both bills of complaint that certain other express companies were, during the year ending April 30th, 1910, transacting business as express companies in the state of South Dakota, the same as plaintiffs.

That the names of the express companies so transacting business in said state are, The United States Express Company, The Great Northern Express Company, The Western Express Company, and The Adams Express Company.

That each of said express companies made reports to the Auditor of the state of South Dakota of its business transacted within the state of South Dakota during the year ending April 30th, 1910, and of the value of its office furniture, fixtures, real estate and other property within the state of South Dakota, of the number of miles operated within said state, the number of offices within said state, and of its total gross earnings for business transacted within said state.

Said bills further state that the total value of all the property of said companies respectively as shown by said reports is as follows, United States Express Company, less than the sum of two thousand dollars; Great Northern Express Company, less than two thousand dollars; Western Express Company, less than five hundred dollars; Adams Express Company, less than six thousand dollars.

It is further alleged by the plaintiffs in their bills of complaint that the State Board of Assessment and Equalization obtained from

the reports of the various railroad companies transacting business in South Dakota over whose lines said various express companies other than the plaintiffs conducted the express business the amounts severally paid to said railroad companies by said several express companies, other than plaintiffs, as compensation for the carriage by said railroads of the express matter for said several express companies, and ascertained from said reports that the amounts reported as so paid by said express companies were as follows:

52

Great Northern Express Company, ...	$6626.47
United States Express Company, ...	6812.22
Western Express Company, ...	1507.28

It is then alleged, upon information and belief, that the amount so reported by the railroad companies as having been paid to them by plaintiffs and the other express companies transacting business in the state of South Dakota, for express service for the year ending April 30th, 1910, were not in truth and in fact the amounts charged by said railroad companies and paid by said express companies for such express service, but that said several express companies transacted business over the lines of said several railroad companies not only in the state of South Dakota but in the neighboring states of the United States, and that in such other states there being a greater population and more numerous business centers, the express traffic is very greatly in excess of the express traffic between different points in the state of South Dakota.

It is further alleged that in making the reports to the said State Board of Assessment and Equalization of the amounts paid to them for express service by the express companies transacting business in the state of South Dakota, said several railway companies did not report the amounts paid for the express service supplied in the state of South Dakota, but obtained the amount so reported by dividing the total amount paid by the express companies for express service over the entire lines of each of said railroads by the mileage of said railroads, and then apportioned arbitrarily to the state of South Dakota, an amount of the total sum paid by the express companies, proportionate to the mileage of the said railroads within the state of South Dakota.

That such apportionment was arbitrary and was much greater than their business in South Dakota really earned.

It was further alleged on information and belief, that the said state Board of Assessment and Equalization arbitrarily determined that plaintiffs regardless of the amount or value of their taxable property within the state of South Dakota upon the 1st day of May, 1910, or at any time during the year ending April 30th, 1910, should pay a tax of four and a half per cent upon amounts paid by them to said railroad companies, and that the said tax should be paid by all of the express companies transacting business within the state of South Dakota. That thereupon the said state Board of Assessment and Equalization fixed a rate of taxation upon the assessments of the various express companies transacting business in South

Dakota at twenty-eight mills upon each dollar of assessed val-
53 uation. That the said Board of Assessment and Equalization thereupon made a further computation and ascertained the sum which would be realized by a tax of four and a half per cent upon each dollar of the amounts paid by the several express companies to the railroad companies as aforesaid, for express service, and then made a still further computation to ascertain the assessed valuation which would be necessary to obtain the same amount in taxes at a levy of twenty-eight mills upon the dollar. That as a result of said computation said State Board of Equalization made assessments upon the various express companies transacting business in South Dakota, and levied taxes thereunder, as follows, to-wit:

Name of Express Co.	Amount paid Railroads.	4¼%	Amount of Assessment.	Amount of Tax.
Wells Fargo & Company	$181173.92	$8152.79	$289877	$8116.55
American Express Company	120689.56	5431.03	193260	5411.28
United States Express Co.	6812.22	306.55	10899	305.17
Great Northern Express Co. ...	6626.47	298.19	11278	315.78
Western Express Company	1507.28	67.83	2262	63.34
Adams Express...	.....	.....	71632	.....

That thereafter the Adams Express Company filed a protest and said assessment was reduced to $40,000 and a tax of twenty-eight mills levied thereon, amounting to $1120.

It is further set forth in said bills of complaint, upon information and belief "that the said State Board of Assessment and Equalization purposely so assessed the said American Express Company and the other express companies transacting business within the state of South Dakota, that the tax levied should be practically equivalent to forty-five mills upon the amount paid by the express companies to the railroad companies for express service, but made such assessment in each instance so that it would vary a few dollars from the amount required to make an assessment upon which the twenty-eight mills tax would be exactly the equivalent of forty-five mills upon the sums paid the railroad companies. That in making said assessment the State Board of Assessment and Equalization disregarded the plain provisions of the constitution of the United States and the Constitution of the state of South Dakota and the statues of the State of South Dakota, and disregarded wholly the report and protest made as aforesaid by your orator and disregarded wholly the value of the property of your orator and disregarded wholly the value of the property owned by the other express companies within

the state of South Dakota and the reports made respectively
54 by said express companies and wilfully and fraudulently assessed the property of your orator in the State of South Dakota in the sum of "$289877 in the case of Wells Fargo & Company, and levied thereon said tax of $8116.56, and in the sum of $193260 in the case of the American Express Company and levied thereon said tax of $5411.28.

The plaintiff Wells Fargo & Company in its bill of complaint thereupon alleges in substance that it is informed and believes that it was the purpose and intent of the said State Board of Assessment and Equalization in making said assessment upon the other express companies within the state of South Dakota, to force them to pay a gross earnings tax of two and one-fourth per cent upon the gross earnings of said plaintiff, and of said other express companies, from business transacted both wholly within the state of South Dakota and partly without said state, and within other states, that is, to impose upon said express companies a gross earnings tax of two and one-fourth per cent upon all business of said express companies, both intrastate and interstate, transacted wholly or partly within said state of South Dakota; and that to obtain such gross earnings of said express companies the Board of Assessment and Equalization arbitrarily assumed that the amounts reported by the railroad companies as having been paid to them by said plaintiff and the other express companies transacting business in South Dakota were fifty per cent of the gross receipts of your orator and of said other express companies arising from their business interstate and intrastate in the state of South Dakota, an assumption which in the case of your orator at least was not warranted by the facts.

No such allegations appear in the bill of complaint of James C. Fargo, president of the American Express Company. There is an entire absence of any such an issue made in the bill of complaint of said company, which is case No. 629. The case in which the issue is made is Wells Fargo & Company, and is No. 628.

The Plaintiff thereupon *both* allege that the said State Board of Assessment and Equalization, in making said assessment upon the property of the plaintiffs, and levying said tax thereon, acted without authority of law, and in violation of the law, in the particulars set forth in the bills of complaint.

It is thereupon alleged that twenty-eight mills upon each dollar of the assessed valuation was equal to the average amount of state, county, school, municipal, road and bridge and other local taxes levied upon other property in the state of South Dakota for
55 the year preceding the making of said assessment upon the property of the plaintiff, and was the average amount of such tax for the year for which said assessment was made in the various counties and subdivisions thereof through which plaintiffs had transacted their business respectively.

It was further alleged on information and belief that the average assessed valuation of the property, both real and personal, belonging to individuals in the state of South Dakota in the year 1910, was

not to exceed forty per cent of the true and actual value in money of such property.

It was further alleged that no assessment has been made upon the property of plaintiffs in any of the counties of the state of South Dakota by local assessing and taxing officers of such counties or of the various municipal and other taxing organizations contained in such counties, and that no tax levy has been made against their property in the state of South Dakota for the year 1910, excepting said levy by said State Board of Assessment and Equalization.

It is thereupon alleged that under the laws of the state of South Dakota said tax so assessed and levied by the Board of Assessment and Equalization upon the property of plaintiffs, constitutes a lien upon all of plaintiffs' personal property, and constitutes a cloud upon their title thereto, and thereupon demand judgment, enjoining the defendant and his successors in office from distraining any property of the plaintiffs to recover the amount of said tax, or from taking any proceeding of any kind, nature or character whatever, looking toward the collection of said tax, or toward the enforcement of the payment of said tax, and that said tax and the assessment upon which the same was based be respectively declared invalid and void, and said tax cancelled.

The defendant thereupon answered said bills of complaint, in substance, demanding strict proof of the organization, principal place of business, membership of the American Express Company, the value of the shares of stock and the residence of stockholders, and as to all matters alleged in the bill of complaint relative to the organization, of said American Express Company. Also of the organization, principal place of business, membership of Wells Fargo Company, value of shares of stock and residence of stockholders.

Admits that the plaintiffs had for many years conducted the business of common carrier, popularly and technically described as the express business.

56 Admits that plaintiffs neither of them own or operate any railroads, but do express business under contracts with railroad companies and through common carriers owning and operating railroads.

Admits that plaintiff Wells Fargo Company is a corporation organized and existing under the laws of the state of Colorado and that James C. Fargo is a citizen and resident of the state of New York.

Admits that plaintiffs submitted statements purporting to show the condition of plaintiff companies in each county in the state as set forth in plaintiffs' bills of complaint, but denies that such statements were full and complete statement of the property owned by said plaintiffs in the state of South Dakota during the year ending April 30th, 1910.

Denies that said statement gave the value of all the property of plaintiffs used in the state of South Dakota during the year ending April 30th, 1910.

Denies that the Board of Assessment and Equalization of the

state of South Dakota assessed any property of either plaintiff not within the state of South Dakota.

States upon information and belief that said plaintiffs owned and used large sums of money in their business in South Dakota during the year ending April 30th, 1910, and alleged that they did not report or list any money whatever for taxation in their said statements, or in any other way or manner, but fraudulently and deceitfully omitted from their said statements and concealed from the State Auditor and the State Board of Assessment and Equalization of South Dakota, the fact that it had large sums of money and used large sums of money in its business in South Dakota during the year ending April 30th, 1910.

Further alleges that the plaintiffs further violated section 16 of chapter 64 of the laws of 1907 of the state of South Dakota in that they fraudulently omitted from [*said*] said statements to the State Auditor a full and fair account of their business done within the state for the year ending April 30th, 1910, and a full and fair account of the gross earnings or total business of such company transacted within the said state for the year ending April 30th, 1910.

It is further alleged that the plaintiffs did a large banking exchange business in the state of South Dakota, by way of sale of and by the cashing of money orders, foreign drafts, traveler's checks, and letters of credit, and earned and used in said branch of its business large sums of money, none of which was reported by said
57 company in its said statement to the State Auditor, but all of which was fraudulently concealed by it under the fraudulent and deceitful claim that they only received money in their offices for shipment as a common carrier, while in truth and fact it did, during all of the year ending April 30th, 1910, advertise on sign boards in front of its offices in this state, the fact that it sold Money Orders, Foreign Drafts, Traveler's checks, and Letters of Credit, and as a matter of fact did sell and cash such orders, checks and letters of credit.

It is further alleged upon information and belief that the plaintiffs did not list all of their property in the state of South Dakota in said statement and did not give the true value thereof, but that the amounts and value of the property belonging to the plaintiffs within the state of South Dakota was greatly in excess of the amount shown in said statements or either of them.

It was further admitted that the Board of Assessment and Equalization convened in regular session on the 5th day of July, 1910, and continued in session as stated in the bills of complaint, and that the said Board fixed a valuation upon the property of Wells Fargo & Company for the year ending April 30th, 1910, at $289877, and upon the American Express Company at $193260, and levied a tax thereon of twenty eight mills on the dollar.

Admits that each of said companies filed a protest in the manner and form stated in the bills of complaint.

The answers further deny that said Board of Assessment and Equalization made no objection to said reports of these plaintiffs, and allege that the said Board did make objection to the reports

and did refuse to accept the same as true, for the reason that said statements did not contain a full, true and complete statement of the property owned by plaintiffs in the state of South Dakota, during the year ending April 30th, 1910, in that said statements did not correctly state the true value of the property belonging to the plaintiffs within the state.

Defendant thereupon admits that the tax levied against the plaintiffs by the said Board of Assessment and Equalization of South Dakota has not been paid and that under the laws of the state of South Dakota he will attempt to collect the same by distraint and sale.

Denies that such distraint will work irreparable and lasting injury and denies specifically that the property of Wells Fargo & Company in the state is less in value than the sum of $18473.98 and that the value of the property of the American Express Company was less than the sum of $10,000.

58 The answers thereupon specifically deny that the tax so levied by the State Board of Assessment and Equalization was based upon the gross earnings of the plaintiffs within the State of South Dakota, or that it was based upon the amount of money paid by the said companies to the railroad companies, but upon information and belief allege the fact to be that the State Board of Assessment and Equalization made its assessment on the property of the plaintiffs according to their value, and that said state Board of Assessment and Equalization took into consideration the amount of gross earnings of said company within the state for the year ending April 30th, 1910, as well as all other information obtainable by said board in order to enable them to place a just and fair value upon the property of said companies, and that the assessment so made against the property of said companies was a true and just value of the property belonging to said companies within the state of South Dakota for the year ending April 30th, 1910.

That the value of the tangible property of said express companies was determined by taking into consideration its capacity and adaptability for the work of conducting an express business, and taking into consideration its value as a part of the entire lines of said company and not as a segregated portion thereof, and that the gross earnings of said companies were used only together with all other information obtainable, to aid the Board of Assessment and Equalization in arriving at a just and true calculation of the property of said companies within the state when considered in connection with the uses to which it was put, and the fact that it was a part of a highly valuable system, and that the value placed upon the property of plaintiffs within this state was only a fair, just and equitable valuation.

The answers thereupon specifically deny that the property of plaintiffs was assessed at more than its true and actual value in money, and deny that such tax amounts to more in proportion than the tax paid by other associations, partnerships or corporations or natural persons upon their property within the state of South Dakota.

The answers thereupon allege that the method adopted by the

said Board of Assessment and Equalization in taxing the property of plaintiffs within the state of South Dakota was the same method that was employed by said Board in taxing the property of all the other express companies doing business within the state at the same time, and that a fair and just valuation was sought to be and was placed upon the property of the plaintiffs.

59 The defendant thereupon denies all fraud or unlawful combination or confederacy or wrong doing, wherewith he and members of the State Board of Assessment and Equalization were by the bill charged, and averred that the plaintiffs had been guilty of fraud and of a wilful disregard of the fifth subdivision of section 16 of chapter 64 of the laws of 1907 of the state of South Dakota in that they and each of them failed to report to the state Auditor the gross earnings of the total business of such company transacted within the state of South Dakota for the year ending April 30th, 1910, and the value of all the property of such company used in the state of South Dakota during said year.

The answers thereupon deny all facts not therefore specifically admitted or answered, and demand that plaintiff' bills of complaint herein be dismissed.

To which answers plaintiffs interposed proper replies.

The defendant filed a motion to dismiss the case of James C. Fargo, individually and as President of the American Express Company, No. 629, at the time of the trial, for the reason of want of jurisdiction, in that it appeared upon the face of the pleadings that there was no diversity of citizenship and no constitutional question raised. In my view of the case this question was involved when the temporary injunction was granted in this action and the then Judge of this court disposed of this question at that time and such ruling will not be questioned now.

Upon the issues joined by such pleadings the cases were submitted upon certain stipulations as to what certain witnesses would swear to if produced in court.

Under the constitution and laws of the state of South Dakota the property of express companies, such as plaintiffs is taxed and neither the constitution nor laws of the state provide for taxing either the gross earnings or the net earnings of such corporations.

Article 11, section 2 of the constitution of the state of South Dakota provides that

"All taxes to be raised in this state shall be uniform on all real and personal property according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.

And the legislature shall provide by general law for the assessing and levying of taxes of all corporation property as near as
60 may be by the same methods as are provided for assessing and levying of taxes upon individual property."

Pursuant to this provision of the constitution and for the purpose of authorizing the tax upon express companies, the legislature

of South Dakota at its regular session in A. D. 1907, passed an Act entitled "Assessment and Taxation", the same being chapter 64 of the Session Laws of the state of South Dakota of A. D. 1907.

Section 16 of said chapter 64 provides as follows:

"Every express company and every sleeping car company doing business in this state must transmit to the auditor of the state a statement of its business done within this state for the year ending on the 30th day of April preceding, which statement must be furnished on or before the 1st day of July of each year, and shall contain the following items.

First. The total number of employes engaged by such company within the state and the number thereof within each county.

Second. The total number of offices maintained by it in this state and the number thereof in each county. The value of all office furniture and fixtures owned by it in this state.

Third. The number of miles of railroad over which such express or sleeping car company conducts its business within the state and the number of miles thereof in each county.

Fourth. The total number of express cars or sleeping coaches owned by such company and used within the state and the number of such express or sleeping cars leased and controlled but not owned by such company and used within this state, or operated under lease or contract in any manner.

Fifth. The gross earnings of the total business of such company transacted within this state for the year ending April 30th preceding, and the value of all the property of such company used in this state."

Section 17 of said statute provided;

"If the statement aforesaid shall not be received by said auditor by the 1st day of August of each year, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly. And for the purpose of aiding the said Board of Assessment and Equaliza-
61 tion in assessing the value of the property of such companies, it is hereby made the duty of the Board of Railway Commissioners to collect information and facts concerning the value of the property of each express and sleeping car company in this state, and to make an estimate of said value and to make and file with the state auditor on or before the 1st day of July of each year a written and detailed report of such information, facts and estimate. The State Board of Assessment and Equalization shall on the first Monday of July each year assess all of the property of each express and sleeping car company doing business in this state and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state for the year ending on the 30th day of April preceding, statements made by said company and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals.

All the statements aforesaid and the information received shall be

laid before the Board of Assessment and Equalization, which Board shall review said statement and information and may change the valuation given or add to said statement any property omitted therefrom, and said Board shall levy a tax on said property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local, taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied."

Section 18 provides:

"That the statement of said companies required by this act shall be made according to such forms and instructions as may be prescribed by the state auditor and with reference to property owned on the first day of May of the year for which the return is made * * *."

It is therefore clear that under the provision of both the constitution of the state and the laws of the state of South Dakota quoted, provision was made for taxing the property of express companies and no provision was attempted to be made for taxing the income, either gross or net.

It is admitted by the pleadings and was conceded upon the trial of the case that the Board of Equalization named in said statute met on the 5th day of July, A. D. 1910, for the purpose of fixing a value upon the property of express companies and continued in session until August 10th, 1910.

62 It is conceded upon the face of the bill of complaint, at page 4 "that upon the 27th day of July, 1910, the said State Board of Assessment and Equalization of the State of South Dakota fixed a valuation upon the property of the plaintiff, Wells Fargo & Company, for the year 1910 at $289,877,"

and at page 6 it is further admitted "that upon said assessed valuation of $289,877, the said State Board of Assessment and Equalization of the state of South Dakota, did at its said session in July and August, 1910, levy a tax against the plaintiff for the year 1910 of twenty-eight mills upon said assessed valuation, or $8,116.56."

It is admitted upon the face of the bill of complaint in behalf of the American Express Company at page 5 that "said State Board of Assessment and Equalization of the state of South Dakota fixed a valuation upon the property of said American Express Company for taxation, for the year 1910, at $193,260."

And at page 6 it is further admitted "that upon said assessed valuation of $193,260, the said State Board of Assessment and Equalization of the state of South Dakota did at its said session on the 10th day of August, 1910, levy a tax against the said American Express Company for the year 1910 of twenty-eight mills upon said assessed valuation, or $5,411.28."

This Board of Assessment and Equalization is provided for by said chapter 64, the time and place for making the assessment is provided and it is provided that a majority of the members of that board shall constitute a quorum and have authority to act.

It will be noted that by the provision of section 16 of the statute above quoted the plaintiffs were required to furnish a statement con-

taining the items named in subdivisions First to Fifth inclusive of that section.

It is maintained by the plaintiffs in these cases, in substance, that it is the intent and purpose of the law that this statement shall be furnished and that the same shall be accepted by the Board of Assessment and Equalization as the value of the property of such company for the purpose of assessment and taxation.

In the first place, the plaintiffs neither of them complied with subdivision 5 of section 16, in that neither company in the statement so furnished gave "the value of all the property of such company used in the state" at the date of the statement.

63 In the second place, no special legal effect is given to such statement.

State ex rel. American Express Company vs. State Board of Assessment and Equalization, 3 S. D. 338.

It was held by the Supreme Court of the state of South Dakota in the case cited that such statement, or information obtained otherwise if no statement is transmitted, is required to be laid before the Board for review and from it and all other matters necessary to enable the Board to make a just and equitable assessment, including the gross earnings of the Company, such Board shall value and assess said property.

The Supreme Court was in that case construing the law of 1891 and it will be noted that the law of 1907 makes additional provision for aiding the State Board of Assessment and Equalization in ascertaining the value of the property of such companies, and it is by section 17 made the duty of the Board of Railway Commissioners to collect information and facts concerning the value of the property of each express company in the state, and to make an estimate of said value and to make and file with the state auditor on or before the first day of July of each year a written and detailed report of such information, facts and estimate.

This additional provision is again noted in the second paragraph of said section, which is as follows:

"That the Board of Assessment and Equalization shall on the first [Mon-ey] of July of each year assess all the property of each express company doing business in the state used in the operation and maintenance of its business and in doing so shall take into consideration the gross earnings of said company within the state and for the year ending on the 30th day of April preceding the statements made by said companies, and by the Board of Railway Commissioners and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals."

All such statements and information are required by said section to be laid before the Board of Assessment and Equalization and that Board is required to review the same and it is provided that it may change the valuation given or add to the statement any property omitted therefrom, and the Board is specifically charged with levying a tax upon said property which shall be equal to the average

amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year.

64 I do not consider the decision of the Supreme Court of the United States in re U. S. Express Co. vs. Minnesota, necessarily implies that under this statute of South Dakota an income tax, gross or net is permitted.

A dierent question would be presented if the state had by legislative act provided for such a tax without an amendment to the constitution of the state.

It isn't necessary to determine that question here. It is sufficient to say that I am of the opinion that under this constitutional provision and the statute enacted pursuant to such provision, the Board of Assessment and Equalization is specifically charged with levying a tax upon the property, etc., of the express companies, as above indicated.

The Supreme Court of the State of South Dakota having specifically held that "no special legal effect is given to this statement filed by the companies," the complaint of these plaintiffs that such statements were ignored by the Board of Assessment and Equalization is without merit.

The real question to be determined, as I understand it, is whether or not the State Board of Assessment and Equalization assessed the property of the plaintiffs at the sums above stated, in the manner provided by said chapter 64 of the Session Laws of A. D. 1907, or did said Board fail to regularly pursue its authority under the constitution of the state and said chapter 64 of the Session Laws of 1907, of the state of South Dakota and fix a value either upon the gross income, the net income, or the amounts paid by the express companies to the railway companies as reported by the railway companies for the year ending April 30, 1910.

There is an absolute want of power under the constitution of the state and the laws of the state above quoted in the said Board of Assessment and Equalization, to levy a tax for the year ending April 30th, 1910, upon the plaintiffs and other express companies in any manner other than upon a valuation of the property of said companies within the state of South Dakota.

And in determining that value, under the provisions of the law of the state of South Dakota, said Board is required to take the statements transmitted by the express companies and shall take into consideration the gross earnings of such companies within the state for the year ending on the 30th day of April preceding the statements, and the estimates of the value of the property of said express companies made and filed with the state auditor by the Board

65 of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals.

It therefore becomes important to consider what the record is in these cases upon which this question of the manner in which this assessment was made must be determined.

It was conceded upon the trial, and is admitted in the pleadings,

that the Board was regularly constituted, that an assessment was made at the time and place named in the statute, that a valuation was fixed upon the property by the Board, and that although a protest was filed by the plaintiffs, it was not allowed.

It being admitted that this Board of Assessment and Equalization was constituted under the laws of the state of South Dakota, under the provisions of said chapter 64, it clearly had the authority to value and assess the property of the plaintiffs within the state of South Dakota.

It being admitted that they met at the time and place named in the statute and that they made a valuation and assessment of the property of the plaintiffs in the sums above named, presumptively, the board did its duty and arrived at that conclusion only after having performed that duty in compliance with the provisions of law, and especially the provisions of section 17 of said chapter 64 of the Session Laws of A. D. 1907.

And therefore the presumption follows that said Board of Assessment and Equalization adopted the basis for making said assessment provided by the constitution of the state and said chapter 64 of the Session Laws of A. D. 1907 of the state of South Dakota.

In making such assessment the Board had the right to take into consideration the gross earnings of said company within the state for the year ending the 30th day of April, 1910, the statements made by the companies and the estimate of the value of the property of plaintiffs made and filed with the state auditor by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of the property in the same ratio as the property of individuals.

In making this assessment they had a right to take into consideration the contracts of the plaintiffs with the railroad
66 companies and in fixing the value of the property and making the assessment the said Board is authorized to take into consideration any and all matters that enable them to make a just and equitable assessment.

The law has placed no limitation upon the Board as to the matters they shall take into consideration and the Court can impose none.

The Court cannot substitute its own judgment for that of the Board of Assessment and Equalization as to what is the assessable value of plaintiffs' property. By this assessment the Board has found that the total value of the property of the plaintiffs is as above [state-]. In fixing its value the Board, presumably, had before it such evidence as the law requires and its decision is binding upon the Courts.

Land vs. Gowen, 48 Fed. 771.
State ex rel. Am. Ex. Co. vs. St. B. of A. & E., 3 S. D. 338.

In a suit of this nature this court will not consider complaints as to results reached by the state taxing Board except it is based on fraud or an adoption of a fundamentally wrong principle.

C. B. & Q. Ry. Co. vs. Babcock, Treasurer of Adams Co., Neb., 204 U. S. 585.

Pittsburg etc. Ry. Co. vs. Backus, 154 U. S. 421.
Maish vs. Arizona, 164 U. S. 599.
Adams Ex. Co. vs. Ohio St. Auditor, 165 U. S. 194.
W. U. Tel. Co. vs. Taggart, 163 U. S. 1.
Ogden vs. Armstrong, 168 U. S. 224.

The question of the cash valuation of the companies' property was a question of fact, the determination of which, by the constitution of the state of South Dakota, and said chapter 64 of the Laws of A. D. 1907, was committed to the said Board of Assessment and Equalization, and the decision of the Board cannot be overthrown by evidence going only to show that the facts were otherwise than so found and determined.

Pittsburg etc. Ry. Co. vs. Backus, 154 U. S. 435.

The presumption that the Board did its duty implies that in making the assessment complained of, it exercised its free and fair judgment and fixed a fair cash value on the property assessed in the manner provided by statute.

C. B. & Q. Ry. Co. vs. Babcock, 204 U. S. 585.

67 This judgment of this Board of Assessment and Equalization implies a finding of all necessary facts.

The memorandum of its decision carries with it a presumption of a compliance with the provisions of the law above referred to under which the Board was acting.

Fayerweather vs. Ritch, 195 U. S. 276.

The Court cannot assume that the state contemplated the taxation of any property outside its territorial limits or that its statutes are intended to operate otherwise than upon persons and property within the state, nor shall it be presumed that the officers of the state, in making this assessment and valuation, violated the plain provisions of the statute when they made the assessment.

Pittsburg etc. Ry. Co. vs. Backus, 154 U. S. 428.

The questions of fact involved in these assessments having been submitted for determination to this special tribunal, its decision creates something more than a mere presumption of fact, and such determination, coming into inquiry before this court, cannot be overthrown by evidence going only to show that the fact was otherwise than as determined.

If the Board determined the value of the property it cannot be overthrown by the testimony that the valuation was other than that fixed by the Board, and such testimony would be competent and can be received in this case only because taken in conjunction with other testimony it might establish fraudulent conduct on the part of the Board sufficient to vitiate its determination.

Pittsburg etc. Ry. Co. vs. Backus, 204 U. S. 435.

The power and duty of this state Board of Assessment and Equalization under a constitutional provision and statutes such as ours,

and especially the manner in which the value of the property of corporations within the state may be ascertained, has been repeatedly defined.

It may not be out of place here to refer to a few of the cases involving the elements that [m-y] be considered by the Board in fixing the value of the property of such companies for the purposes of taxation and apply such principles to the cases in hand.

It is clear that the state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere;
68 on the other hand it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere, and used in commerce among the states. When that property is part of a system which has its actual uses only in connection with other parts of the system, that fact may be considered by the Board of Assessment and Equalization in taxing, even though the other parts of the system are outside of the state.—This being true, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, which is intended to reach the intangible value due to what may be called the organic relation of the property in the state to the whole system.

Fargo vs. Hart, 193 U. S. 499.
W. U. Tel. Co. vs. Taggart, 163 U. S. 1.

The statutes defining the powers of this Board of Assessment and Equalization were conceived and framed upon the idea that the mass of things tangible and intangible which constitute express company property are a unit and should be valued as such.

State vs. Savage, 65 Neb. 714.
State vs. Back, 100 N. W. 952.

It is enough for the state that it find within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws and the rule of all property taxation is the rule of value and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state.

Pittsburg etc. Ry. Co. vs. Backus, 154 U. S. 421.

The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from use. The amount and profitable character of such use determines the value. In the nature of things it is practically impossible—at least in respect to express company property, to divide its value and determine how much is caused by one use to which it is put and how

much by another. It is impossible to disintegrate the value
69 of that portion of the system of the plaintiffs operated within the state of South Dakota and determine how much of that value springs from its use in interstate business and how much from its use in doing business wholly within the state.

An attempt to do so would be entering upon a field of uncertainty and speculation, and because of this fact it is something which the assessing Board is not required to attempt, and the presumption in this case upon the record made by the Board of Assessment and Equalization is that they did not attempt to do so. The presumption is that the Board found within the borders of the state of South Dakota this property of the value above stated.

Cleveland etc. Ry. Co. vs. Backus, 154 U. S. 445.
W. U. Tel. Co. vs. Taggart, 163 U. S. 1.

The valuation is not confined to the office furniture, horses, wagons and books of the express companies or the contracts with the various railway companies under which they operate their system and do business, or the cars in which the same are carried, whether owned or leased or by particular contract for the specific item of express, but includes the proportionate part of the value resulting from the combination of the means by which the business of the express companies is carried on, the value existing to an appreciable extent throughout the entire domain of operation.

Cleveland etc. Ry. Co. vs. Backus 154, U. S. 439.
Adams Ex. Co. vs. Ohio, 165 U. S. 221.

It is, in my judgment, clearly established that the Board of Assessment and Equalization has acted with regard to the property of these express companies which it has assessed in the manner provided by statute.. It has laid a substantial tax upon them. Its judgment under the South Dakota constitution and statutes of the state, is final unless for fraud or unless the plaintiff can show that they did not in fact make an assessment of the property but that they levied an income tax either gross or net or a tax upon the amounts paid to the railway companies.

Missouri vs. Dockery, 191 U. S. 170.

The plaintiffs recognize this rule and insist that though the record of the action of the Boards of Assessment and Equalization is regular upon its face, as a matter of fact, the Board wilfully and fraudulently entered into a scheme to disregard the plain provisions of the statute and law of the state and to levy a tax upon the plaintiffs in the manner set forth in their bill of complaint as follows:

70 "The State Board of Assessment and Equalization of the State of South Dakota, in making said assessment upon the property of your orator in the state of South Dakota, and in levying a tax thereon, wilfully and fraudulently, disregarded said report and said protest filed by your orator, and wilfully and fraudulently disregarded the true and actual value of the property of your orator

in the State of South Dakota, and that said State Board of Assessment and Equalization arrived at said assessment and at said tax in the following manner, to-wit:

That said Board of Assessment and Equalization obtained from the reports of the various railroads transacting business in South Dakota over whose lines your orator conducted its express business, the amounts reported by said several railroads as severally paid to them for the year ending April 30th, 1910, by your orator as compensation for the carriage by said railroads of the express matters and ascertained from such reports that the amounts so paid were as follows, to-wit:"

It then sets forth the amount reported paid to -he railway companies in the state in the sum of $181,173.72 in the case of Wells Fargo & Company, and in the sum of $120,689.56 in the case of the American Express Company.

The complaint then sets forth the names of the different express companies doing business in the state of South Dakota for that year and the amounts paid by the express companies to the railways for carrying express, as reported by the railways to the auditor of the state of South Dakota, and allege that the amounts so paid were as follows; Great Northern Express Company, $6,626.47; United States Express Company, $6,812.22; Western Express Company, $1,507.28.

Thereupon both bills of complaint allege:

"That the State Board of Assessment and Equalization of the state of South Dakota arbitrarily determined that your orator, regardless of the amount or value of its taxable property within the state of South Dakota, upon the first day of May, 1910, at any time during the year ending April 30th, 1910, should pay a tax of four and one-half per cent upon amounts paid by it to said railroad companies and that the same tax should be paid by all of the express companies transacting business within the state of South Dakota. And that thereupon the said State Board of Assessments and Equalization fixed a rate of taxation upon the assessments of various express companies transacting business in South Dakota, at twenty-eight mills upon each dollar of assessed valuation."

71 It is further alleged

"That the State Board of Assessment and Equalization thereupon made a further computation and ascertained the sum which would be realized by a tax of four and one-half per cent upon each dollar of the amounts paid by the several express companies to the railroad companies as aforesaid, for express service, and then made a still further computation to ascertain the assessed valuation which would be necessary to obtain the same amount in taxes at a levy of twenty eight mills upon the dollar."

It is further alleged that the various sums assessed against the different companies in the state were made upon this basis.

Upon this proposition absolutely no evidence was introduced by the plaintiffs to sustain their contention.

The record, with all of its presumptions stands in favor of a finding of fact that the Board of Assessment and Equalization did tax the property of the plaintiffs at the several sums named in the

manner provided by law, and that record of the Board is tantamount to a finding, after a consideration of all of the elements that should have been considered by them under the provisions of the statute above referred to, and a general finding of all facts necessary to sustain the amount of the assessment.

Fayerweather vs. Ritch, 195 U. S. 276.

The determination of this taxing Board is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and ought never to be overthrown or limited by oral testimony of either of the members of the Board as to what he had in mind at the time of the decision.

Fayerweather vs. Ritch, 195 U. S. 276.

In this respect the action of the Board does not differ from that of a jury or an umpire, if we assume that the members of the Board were not entitled to the possibly higher immunities of a judge.

C. B. & Q. Ry. Co. vs. Babcock, 204 U. S. 585.

The record of the Board of Assessment and Equalization is the best evidence at least of its decisions and acts. If the Plaintiffs or other express companies wished a definite and certain ruling by this Board upon the deductions which they now seek to make from the record, they could have asked for it and could have asked to have the action of the Board or its refusal to act, noted in the
72 record. They could then have offered evidence of just what was done after such request had been made and refused.

C. B. & Q. Ry. Co. vs. Babcock supra,
Fargo vs. Hart, 193 U. S. 490,
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. vs. Backus, 133 Ind. 513.

Nothing of this kind was done. Nor can the members of the Board be heard to state the operations of their minds in fixing the values of the property of the plaintiffs and in making the assessment. Under the decisions above quoted this is improper and therefore no consideration will be given to the testimony of the officers of the state who were produced as witnesses and testified and their testimony received under objection, in so far as such testimony relates to the decisions and acts of said Board.

In the absence of any evidence by the plaintiffs other than the record of the assessment of the plaintiffs and the statements of the amounts paid to the railway companies by other express companies for the same year and the amount of taxes assessed against the respective companies, these plaintiffs are left standing upon the one proposition that "it appears from the record in this case that no legal assessment was ever made of the preporty of [*eight*] Wells & Fargo Company or the American Express company for the year 1910."

It is argued that the State Board of Assessment and Equalization in the year 1910, as a matter of fact, wilfully and fraudulently disregarded the true and actual value of the property of the express

companies in the state of South Dakota, and obtained from the reports of the various railroads transacting business in South Dakota, over whose lines plaintiffs conducted their express business, the amounts reported by said several railroads as severally paid to them for the year ending April 30th, 1910, by plaintiffs as compensation for the carriage by said railroads of express for plaintiffs and arbitrarily imposed a tax thereon of 4½%. And it is further claimed that this was the method adopted by the Board is evidenced by the assessments placed against five of the six companies transacting business in the state of South Dakota.

It is conceded that the demonstration cannot be made as to the Adams Express Company on account of a complication of the figures. And the plaintiff offers the following tabulation as a mathematical demonstration of the above claim:

73

Express company.	Am't paid railroads.	4½%	Assessment.	Tax.
American Express Company	$120,689.56	$5,431.03	$193,260	$5,411.28
Wells Fargo & Company	181,193.72	8,152.79	289,877	8,116.55
United States Express Company..	6,812.22	306.55	10,899	305.17
Great Northern Express Company..	6,626.47	298.19	11,278	315.78
Western Express Company	1,507.28	67.83	2,262	63.34

It is also argued that inasmuch as the record shows that fifty to fifty-five per cent of the earnings of the express companies was paid to the railroad companies, that therefore the assessment made by the Board was a 2¼% tax upon the gross income or 4½% tax upon the net income.

The first objection to this is that in the cases under consideration, the Wells Fargo & Company paid the railways 55%, and 4½% of 55% of their earnings would not be 2¼% or 45%, conceding that that was the net earnings.

I may add, too, that if figures are to be taken as a mathematical demonstration with absolutely no proof whatever that this Board used or adopted the method by which they were arrived at, they must demonstrate, and though the variance may be slight, if there is a variance there is no demonstration.

In the figures in the above table it will be noted that in the case of the American Express Company the tax is $5,411.28, and the 4½% computation upon the amount paid the railroads is $5,431.03, and so on down through the list there isn't a single computation that is exact, and in the case of the Great Northern Express Company the plaintiff argues that an error was made of a thousand dollars, by adding that amount to the assessment of the Great Northern Express Company and that instead of an assessment of $11,278

there should have been an assessment of $10,278. But there is no evidence of an error except that plaintiffs so argue.

It will also be noted that for some reason the Board of Assessment and Equalization valued the property of the Great Northern Express Company at more than the United States, although the latter did more business and had a greater income, thus demonstrating that the making of this assessment was not a simple matter of computation upon earnings or the amount paid the railway companies as reported by them.

And in the light of what might, should have been and presumably
was taken into consideration by this Board of Assessment and
74 Equalization it is rather a demonstration that one or more
of the competent elements to be considered was found by said Board to enhance the value of the Great Northern and it does not sufficiently answer the situation to say that it was a mistake upon the part of the Board.

It may also be remarked that an examination of the bills of complaint filed in these two cases show that in the Wells Fargo & Company case number 628, the plaintiff alleges "that it was the purpose and intent of said Board of Assessment and Equalization, in making said assessment upon your orator, and in levying said tax and in making said tax upon other express companies within the state of South Dakota, to force said plaintiff and other express companies to pay a gross earnings tax of 2¼% upon the gross earnings of plaintiff and other express companies from business transacted wholly within the state of South Dakota and partly without said state and within other states, that is, to impose upon the plaintiff and said other express companies, a gross earnings tax of 2¼% upon all the business of plaintiff and of said other express companies both intrastate and interstate transacted wholly or partly within the state of South Dakota. And that to obtain such gross earnings of plaintiff and other express companies transacting business within the state of South Dakota, the Board of Assessment arbitrarily assumed that the amounts reported by the railroad companies as having been paid to them by plaintiff and other express companies were fifty per cent of the gross receipts of the plaintiff and other express companies arising from their business, interstate and intrastate, in the state of South Dakota, an assumption which in the case of the plaintiff at least was not warranted by the facts."

No such allegations appear in the bill of complaint in the case of the American Express Company, and as a matter of fact in the case in which they do appear, the record discloses that that plaintiff paid 55% instead of 50%.

There isn't a word of evidence upon which the Court could predicate a finding that the Board of Assessment assumed "that the amounts reported by the railroad companies as having been paid to them by the plaintiff and by other express companies transacting business in South Dakota were 50% of the gross receipts of the plaintiff and of said other express companies, arising from their business, interstate and intrastate in the state of South Dakota."

An extended discussion of these figures can be of no benefit. Suffice it to say that if the plaintiff in a case of this kind
75 seeks to impeach the action of the Board of Assessment and Equalization simply by showing that upon the face of the record they reached their conclusion and made the assessment in a manner differing from that authorized by the statute, the figures taken from the record must absolutely demonstrate the proposition relied upon and it is not sufficient to assume that the Board intended to levy a certain per cent upon earnings, gross or net, simply because the value fixed by them is approximately a certain rate upon either the amounts paid by the express companies to the railways or upon the gross and net earnings, unless there is some evidence that such rate was in fact adopted.

This is especially true in this case because it appears on the face of the record that these companies do other business than that for which they have paid these amounts to the railway companies. They do a money order business. This portion of their earnings is not attempted to be shown.

There is absolutely nothing in this record upon which the Court could make a finding of what the income of these plaintiffs was, net or gross for the year ending April 30th, 1910.

It therefore conclusively appears, in my judgment, that the contention of the plaintiffs can not be sustained.

In my judgment there is absolutely nothing in the record that justifies the plaintiffs assuming that the Board of Assessment and Equalization ever considered 4½% of the amounts paid by the express companies to the railway companies or 4½% upon the net income or 2¼% upon the gross income. There isn't a word of testimony that would even indicate that any such method was considered by the [*the*] Board of Assessment and Equalization unless it be the mere fact that the value fixed upon the property of the express companies for the purpose of taxation figures out approximately that amount.

But why say 4½% upon the net income or 2¼% upon the gross income or either per cent upon the amount paid by the express companies to the railway companies?

It is admitted in the argument of counsel for plaintiffs that in no case does the tax levied exactly equal the amount of 4½% of the gross earnings or net earnings, but counsel says that the reason for this is that the State Board of Assessment and Equalization in 1910, used a complicated system of computation in order to take into account the fact that 55% of the earnings of some of the express companies was shown to be paid to the railroads and insists that the computation used by the Board is intricate but can be ascer-
76 tained from the results obtained and a showing made of the imposition upon the plaintiffs by the Board of a gross earnings tax in 1910.

Counsel then proceeds to demonstrate the method by which the Board arrived at the amount paid the railroad companies by the

Adams Express Company, which is a matter of speculation and in my judgment cannot reasonably be deduced from the record.

He shows that the property of this express company was valued at the sum of $71,632 and was thereafter reduced, by the Board, upon protest filed by the company, to the sum of $40,000, and that a tax was levied in the sum of $1,120.

After assuming that a mistake was made of a thousand dollars in the assessment of the Great Northern Express Company, and after adjusting the amount assumed to have been paid by the Adams Express Company to the various railroads, counsel insists that "the tax actually levied by the State Board of Equalization amounts to a 4½% income tax upon the aggregate amounts paid by the six express companies to the railroad companies, less 10% of 4½% of the total income" and produces the figures as follows:

Total paid railroads by the six express companies, $361,400.27, deduction of 10% of 4½% of total paid railroads, $1,626.30, leaves a balance of $359,773.97, multiplying that by 4½% gives a result of $16,189.82.

In other words, after deducting a thousand dollars from the assessment levied by the Board upon the Great Northern Express Company, and after having by a complicated method adjusted the tax upon the Adams Express Company and then by deducting 10% of 4½% of the sums paid by all of the companies as modified by such adjustments, and then multiplying that by 4½% produces practically the sum total of the tax levied against all of the express companies, and because this system produces such figures counsel argues that the Board pursued such method.

In the first place, the Court cannot assume that a mistake of a thousand dollars was made by the Board of Assessment and Equalization in the valuation of the property of the Great Northern Express Company.

In the second place, in the absence of any evidence whatever as to the method in which the valuation of the property of the Adams Express Company was arrived at by the Board, the Court cannot assume that the Board adopted any complicated system of figures or that they figured at all with reference to the amounts paid
77 by said company to the railroad companies for that year.

Then again as to the argument of plaintiff, based upon the totals paid the railroad companies, as modified by the assumption of counsel, I cannot bring myself to find that it is a mathematical demonstration upon the record that the Board of Assessment and Equalization ever considered in any way the system or scheme outlined by counsel.

I am impressed that these contentions of the plaintiff are conclusive proof of the unreliability of either of its claims as to the manner in which this assessment was made and amounts to a demonstration that different methods of computation may have been used by the Board, but are wholly insufficient to overcome the presumption that the Board did its duty, in the absence of any evidence that the Board used either of these methods of computation,

and in the absence of any evidence that the Board in any way exceeded its authority, and in the absence of evidence that it proceeded in any way except that authorized by statute.

There is nothing in the record with reference to this percentage nor is there anything in the record that in my judgment should be construed as a suggestion that any such percentage were ever used.

No matter what the valuation fixed by the Board of Assessment and Equalization, it would be approximately some per cent or fraction thereof of any other given or known quantity or amount, representing net, or gross income or any other given value.

The absence in this record of any evidence showing, or any attempt to show, the gross earnings of the plaintiffs or the net earnings of the plaintiffs or that the Board of Equalization knew or attempted to ascertain either the gross or net earnings of the plaintiffs is fatal to the claim that such earnings were attempted to be made the basis of taxation instead of the valuation of their property as shown by the record of the Board of Assessment and Equalization.

I am convinced, beyond all doubt, that this record fails to show that "no legal assessment was ever made of the property of either of the plaintiffs for the year 1910."

Counsel for plaintiffs call my attention to the decision in this Court by Judge Willard between the same parties to these actions, involving the 1909 tax upon the property of the plaintiffs.

78 I agree with Judge Willard upon this interpretation of the provision of the constitution of the state and the law of the state, defining the manner in which the property of the plaintiffs should be assessed, and prescribing the authority of the Board of Assessment and Equalization.

Upon the question of fact involved, however, it is my contention that these cases present a different situation than was presented to Judge Willard in the 1909 cases, and therefore I reach a different conclusion based solely upon the determination of the issues of fact as presented in the pleadings and the record in the cases at bar.

The question of the constitutionality of chapter 64 of the Session Laws of A. D. 1907, of the laws of the State of South Dakota, must be regarded as conclusively settled for this Court by the opinion of the highest Court of the State of South Dakota, as announced in the case of State ex rel. American Express Company vs. State Board of Assessment and Equalization, 3 S. D. 338, heretofore cited.

It is true the Supreme Court was then considering the provisions of Chapter 14 of the Session Laws of A. D. 1891, the provisions of which were substantially like those of the present law, the provisions of the present law [impsoing] a duty upon the Railway Commission to furnish certain information to the Board of Assessment and Equalization and providing that the same shall be considered by such Board in making a valuation of the property of the express companies for the purpose of taxation.

Every statute is presumed to be constitutional. The Courts ought not to declare one to be unconstitutional unless it is clearly so. If

there is doubt the expressed will of the legislature should be sustained.

Munn vs. Ill. 94 U. S. 113.
Home Tel. Co. vs. Los Angeles, 211 U. S. 123-281.

I therefore conclude that the law under which the assessment was made is valid, that the assessment of the plaintiffs for the year 1910 was made by the Board of Assessment and Equalization at the time and in the manner provided by statute; that upon the face of this record it appears that the property of the plaintiffs was valued for assessment in the manner provided by law, and that the rate of taxation was fixed at twenty eight mills.

It is admitted by the pleadings that the rate of assessment was the average amount of such tax for the year for which said assessment was made in the various counties and subdivisions thereof
79 through which the plaintiffs transacted their business and in which their property was situated.

It follows that separate judgments of dismissal and dissolving the injunctions heretofore issued in these two cases should be entered.

It is so ordered.

Approved 4/2/13.

J. D. ELLIOTT, *Judge.*

Endorsed: Filed in the District Court on April 2, 1913.

Præcipe for Record on Appeal.

In the District Court of the United States for the District of South Dakota, Southern Division.

No. 628. In Equity.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant.

To the Clerk of the District Court of the United States for the District of South Dakota:

You will incorporate into the transcript on appeal in the above entitled cause the following portions of the record in said cause.

1. Chancery Subpœna with Marshal's return of service thereof.
2. Bill of Complaint.
3. Answer to Bill of Complaint.
4. Replication to answer to bill of complaint.
5. Statement of evidence as same may hereafter be approved by the Court or Judge.
6. Opinion of Court.
7. Final decree.
8. Petition for appeal.

9. Assignment of errors.
10. Bond on appeal.
80 11. Præcipe for record on appeal.
Dated Sioux Falls, South Dakota, July 16th, 1913.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

CHARLES W. STOCKTON,
Of Counsel.

Endorsed: Filed in the District Court on July 17, 1913.

(*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
District Court of the United States within and for the District of South Dakota, ss:

I, Oliver S. Pendar, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, pursuant to the order allowing the appeal, entered on the 18th day of July, A. D. 1913, that the foregoing, consisting of 129 pages, numbered consecutively from one to one hundred twenty-nine inclusive, is a true and complete transcript of so much of the record, process, pleadings, orders and final decree and all other proceedings in said cause, in so far as the same is enumerated in the præcipe for the record, filed on July 19th, 1913, in Equity Cause No. 628, wherein Wells Fargo & Company is plaintiff, and George G. Johnson, as Treasurer of the State of South Dakota, is defendant, and of the whole thereof, as appears from the original records and files of said court; and I further certify that I have embraced within said paging the original Citation, together with the acceptance of service thereof, and a copy of the Opinion filed in said cause, and in addition thereto a copy of said Præcipe.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District of South Dakota, this 25th day of August, A. D. 1913.

[Seal U. S. District Court, Dist. of South Dakota, Sioux Falls.]

OLIVER S. PENDAR, *Clerk.*

Filed Sep. 4, 1913. John D. Jordan, Clerk.

81

(*Order of Argument.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1913.

No. 4039.

WELLS FARGO AND COMPANY, Appellant,
vs.
GEORGE G. JOHNSON, as Treasurer, etc.

Appeal from the District Court of the United States for the District of South Dakota.

THURSDAY, January 8, 1914.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. O. Bailey for appellant and continued by Mr. Royal C. Johnson for appellee, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

December Term, 1913.

FRIDAY, January 9, 1914.

This cause having been called for further hearing, argument was resumed by Mr. Royal C. Johnson and continued by Mr. L. T. Boucher for appellee, and concluded by Mr. C. O. Bailey for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

82 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 4039.

WELLS FARGO AND COMPANY, Appellant,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Appellee.

Appeal from the District Court of the United States for the District of South Dakota.

December Term, A. D. 1913.

No. 4040.

JAMES C. FARGO, Individually and as President of the American Express Company, Appellant,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Appellee.

Appeal from the District Court of the United States for the District of South Dakota.

Mr. C. O. Bailey (Messrs. Bailey & Voorhees, Mr. Joseph W. Welsh and Mr. Charles W. Stockton, were with him on the briefs), for appellants.

Mr. Royal C. Johnson, Attorney General of South Dakota, and

Mr. L. T. Boucher, appeared for appellee.

Before Sanborn and Carland, Circuit Judges, and Riner, District Judge.

83 *Syllabus.*

1. Taxation—Assessment—Express Companies—Provision of South Dakota Statute Unconstitutional.

In 1910 the Constitution of South Dakota provided that "all taxation shall be equal and uniform," that "all taxes to be raised in this State shall be uniform on all real and personal property according to its value in money to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the Legis-

lature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property." While the property of individuals and of the great majority of the tax payers in the State was assessed according to its actual value in money without considering the earnings of its respective owners, and taxes were levied at a uniform rate on all assessments, the Legislature required the State Board of Assessment and Equalization in making the assessments upon the property of each express company doing business in that State to "take into consideration the gross earnings of said company within the State for the year ending on the 30th day of April preceding." Laws of South Dakota 1907, Chap. 64, Sec. 17, and the Board did so and measured the assessments of the property of such companies by the companies' earnings far more than by other matters considered.

Held: The provision of Section 17 quoted violated the provisions of the constitution quoted and the assessments of the property of the express companies were void.

2. Courts—Opinions—Not Authoritative Beyond Questions Decided.

"General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

84 3. Taxation—Injunction—Systematic, Repeated Unconstitutional Assessments Justify Injunction.

Systematic, repeated, continuing violations of the constitution or the law in the making of assessments and the levying of taxes, like continuing trespasses, justify an injunction against the continuance of such a course and the collection of taxes so levied.

SANBORN, *Circuit Judge,* delivered the opinion of the Court.

These are appeals from decrees which dismissed complaints to enjoin the treasurer of South Dakota from collecting taxes levied against the plaintiffs by the State Board of Assessment and Equalization of the State of South Dakota in the year 1910. The plaintiffs are express companies and they claim that the assessments of their property made by the Board in 1909 and 1910, on which it levied the taxes in those years, were made in violation of the Constitution of the State of South Dakota in that in making them it took into consideration their earnings in the State while the earnings of the great majority of the tax payers of the State were not considered in assessing their property for taxation, that these assessments were made in violation of the statutes of that State in that the Board based them on a certain percentage of the respective amounts the plaintiffs paid to the railroad companies for transportation services in South Dakota

instead of founding them on the values of their personal and real properties, and for other reasons. They brought suits on these grounds to enjoin the collection of the taxes in 1909 against them. Those suits were heard and decided in their favor by Judge Willard and decrees for injunctions were rendered from which no appeals were ever taken. Before the decision of those cases was made the Board had made the assessments of 1910 which the court below has sustained in these cases and that ruling is assigned as error. These cases were heard together and whatever is said concerning one of them in this opinion which is not clearly applicable to that one alone is equally applicable to the other.

The Constitution of South Dakota in force in 1909 and 1910 provides in Article 6, Section 17, that "all taxation shall be equal and uniform" and in Article 11, Section 2, that "all taxes to be
85 raised in this State shall be uniform on all real and personal property according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and the Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property." Section 17, of Chapter 64 of the laws of South Dakota 1907, which was in force in 1909 and 1910, provides that the Board shall "On the first Monday in July each year assess all the property of every express and sleeping car company doing business in this State and used in the operation and maintenance of its business and in doing so shall take into consideration the gross earnings of said company within the State for the year ending the thirtieth day of April preceding, the statements made by said companies and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals," and that "said board shall levy a tax upon said property which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year." Section 16 of the Act provided that every express company doing business within the State must transmit to the state auditor on or before July in each year a statement of the gross earnings of the total business of the company transacted in the State for the year ending April 30th preceding, and of the value of its office furniture, fixtures and real estate within the State. Wells Fargo & Company made a statement to the auditor in June, 1910, that its gross earnings within the State for the year ending April 30, 1910, were $131,096.28 and that the value of its office furniture, fixtures and real estate was $18,473.98. The board assessed the value of its property $289,877.00, and assessed a tax of 28 mills on the dollar upon it which made its tax $8,116.65. The American Express Company made a similar report and received a similar assessment. It is admitted in the answer and the testimony for the defendant was that in making these assessments of the plaintiff's property the board considered, among other things, the earn-

86 ings of and the business done by the companies in the State of South Dakota, and defendant's counsel in their brief in this court say "As has been said, the board of assessment of South Dakota did consider among other things, the income of appellant, so far as they could ascertain it, the contracts of appellant with the railway companies, the uses to which its property was put, and the intangible as well as the tangible assets in this State, in fixing this valuation. If this was wrong, then the tax must fall; but we contend it was not wrong."

It is conceded that the Board was without either constitutional or statutory authority to tax either the gross or net earnings of the company in the State of South Dakota in lieu of all other taxes or of taxes on its property, and that the limit of its lawful power was to assess and tax its "real and personal property according to its value in money * * * so that every person and corporation shall pay a tax in proportion to the value of his, her or its property" as the constitution requires. The value of real and personal property in money is the amount that can be realized from it by sale of it within a reasonable time and that is the valuation at which the local assessors were required to assess, and presumptively did assess, the property of individuals and of the vast majority of the tax payers in the State of South Dakota. Counsel argue that the assessors of such property are not prohibited from considering the earning power of that property for the purpose of ascertaining its actual value. But this contention is fallacious and irrelevant in this case. In the first place while such assessors may and doubtless do consider the rental value and in that sense the earning power of some kinds of real and personal property, it is common knowledge that the customary and lawful measure of the value of such property which they use is the selling value of the property, and in the second place, it was not the earning power of the plaintiffs' property in South Dakota that the Board considered as a measure of its value, but the earnings of the plaintiffs themselves, the earnings of the owners of the property.

The first question in this case, therefore, is whether or not taxation at a uniform rate, at the rate of 28 mills on the dollar in this case, of the real and personal property of one tax payer on a valuation measured by its selling value in money and of the real and personal property of another tax payer on a valuation measured by

87 the earnings of the owner of the property as well as by its selling value, is equal and uniform taxation of the real and personal property of both so that each "person and corporation shall pay a tax in proportion to the value of his, her or its property" as the constitution requires. This question seems susceptible of but one answer, it seems impossible that such assessments could produce equal and uniform taxation according to the value in money of the property assessed. Counsel for the defendant, however, invoke the familiar rule that the national courts follow the settled construction by the highest judicial tribunal of a state of its constitution and laws where no question of general or commercial law or of the constitution or laws of the United States is involved, and

insist that the Supreme Court of South Dakota decided in State ex rel. American Express Co. v. State Board of Assessment and Equalization, 3 S. D. 338, that a statute which authorized the Board to consider the gross earnings of a corporation in making the assessment of its property did not violate the constitution of that State. The opinion in that case has been carefully and repeatedly read and searched in vain for any presentation, discussion, reference to or decision of the question whether or not a statute which required the Board to take into consideration the gross earnings of one class of tax payers in assessing their real and personal property for taxation while the assessors of the property of other classes were not required to and did not take their earnings into consideration in assessing their property, was violative of the provisions of the constitution which have been cited. The only constitutional question mentioned in that opinion is whether or not the taking into consideration by the Board of the contracts of the express company with the railroads which related to transportation to and from some places without as well as those within the State was an invasion of the right to conduct interstate commerce and therefore a violation of the constitution of the United States. 3 S. D. 350. It is true that the court considered and decided that the Board did not violate the statute under consideration in that case by taking into consideration in making its assessment the gross earnings of the express company, 3 S. D. 347, which by its terms that statute expressly authorized the Board to consider, as does the statute now in hand, but the position was nowhere taken, discussed, considered or decided that the statutory grant of this authority to the Board was in violation of the constitution of the State. The result is that the decision of this question may
88 not be lawfully avoided by this court on the ground that the highest judicial tribunal of the state has settled it, and the authoritative words of Chief Justice Marshall govern here. "General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cohens v. Virginia, 6 Wheat. 264, 293; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Traer v. Fowler, 144 Fed. 810, 817, 75 C. C. A. 540, 547; Mason City & Fort Dodge Ry. Co. v. Wolf, 148 Fed. 961, 968, 78 C. C. A. 589, 596; Evans v. Victor, 204 Fed. 361, 367, 122 C. C. A. 531, 537.

An attempt is also made to sustain the constitutionality of this statute and the validity of the assessments of the plaintiffs' property under it by the decisions in State v. United States Express Co., 114 Minn. 346, 131 N. W. 489; United States Express Co. v. Minnesota, 223 U. S. 335, 348, and Postal Telegraph Cable Co. v. Adams, 155 U. S. 688-696-697. But the Constitution of Minnesota expressly authorized the Legislature of that State to impose a tax upon the gross earnings of express companies, Art. 9, Sec. 17, and it contained no such requirements or restrictions as those that have been cited from the Constitution of South Dakota. The Legislature of Minnesota under the Constitution of that State passed an act providing for

a six per cent tax on the gross earnings in Minnesota of express companies in lieu of all other taxes. Revised Laws Minnesota 1905, Secs. 1013, 1019. The State sued the Express Company to recover this six per cent of certain earnings which the Express Company had derived from business which that Company claimed constituted interstate commerce and hence was exempt from taxation by the State under the commercial clause of the Constitution of the United States. The Supreme Court of Minnesota in the case first cited above adjudged this claim and held that a part of these earnings were and a part were not exempt from taxation by the State under the Constitution of the United States. 131 N. W. 490. In the discussion of this question the court re-affirmed its previous decisions that these taxes on gross earnings of corporations in lieu of all other taxes pursuant to the express authority of the Constitution of Minnesota were in reality taxes on the property of the corpora-
89 tion measured by their gross earnings. 131 N. W. 491, 492.

When this case reached the Supreme Court the only question it presented there was whether or not any of the gross earnings upon which the Minnesota court had sustained the tax were exempt from taxation under the commercial clause of the Constitution of the United States and that court held that they were not. 223 U. S. 347, 348. In the course of its opinion the Supreme Court of the United States recited the fact that the Minnesota court had construed the tax to be a tax upon the property of the Company measured by its gross earnings within the State and remarked that it was not prepared to say that this conclusion was not well founded in view of the provisions and purposes of the law. In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 696, the only question before the court was whether or not a tax levied by the State of Mississippi was violative of the commercial clause of the Constitution of the United States and upon that issue alone are the remarks of the court either authoritative or material. Thus it appears from a review and analysis of these decisions upon which defendant's counsel seem to rely (1) that the only question at issue or decided in any of them was whether or not certain taxes were levied in violation of the commercial clause of the Constitution of the United States, (2) that the construction in the Minnesota case that a tax on the gross earnings in a State of a corporation is a tax on its property therein measured by the gross earnings was based on express authority in the Constitution of that State to tax the gross earnings and on the fact that such tax was levied in lieu of all other taxes on its property and (3) that there is nothing in the adjudications or opinions in these cases to the effect that in the absence of express authority in the Constitution of a State to levy taxes on the gross earnings of a corporation and in the face of positive declarations therein that all taxes "shall be equal and uniform," that "all taxes raised in this State shall be uniform on all real and personal property according to its value in money * * * so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property" and that "the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual prop-

erty" a statute which requires the taxation of the property of a corporation on an assessment of its property by the consideration
90 of the gross earnings of the corporation in the State and the value of its property while the property of the vast majority of the tax payers of the State is taxed upon assessments measured by the actual value of their property without any consideration of the earnings of its owners is not violative of these constitutional restrictions, or that an assessment made in accordance with such a statute is not void. And so the question recurs and demands its answer.

It is conceded that the people of a state may, by express provisions in its constitution, authorize their legislative and executive officers to measure the assessable value of the taxable property of a corporation by its gross earnings in the state. That is not the question which this case presents. The question here is, may such officers measure the assessable value of the real and personal property of the corporation by the earnings of that corporation in the state, or by a consideration of the earnings of the corporation without such constitutional authority and in defiance of the stringent and mandatory restrictions of the Constitution of South Dakota. In a simple case the answer seems not to be doubtful. If each of two individuals owns real and personal property of the same actual value and has gross earnings of $100,000.00 a year, and one of them is taxed on an assessment of his real and personal property measured by its actual value in money without a consideration of his earnings, and the other on an assessment of his like property measured by his gross earnings and the actual value in money of his property, or if the value of the property of one is assessed without and that of the other with a consideration of his gross earnings, that taxation certainly cannot be equal and uniform, it cannot be such that each will pay a tax in proportion to the value of his property for the consideration of the gross earnings is required by the South Dakota statute to have and it unavoidably would have an effect upon the assessment. If an individual and a corporation are in the same business, as commission merchants, grocers, wholesale dealers in dry goods, or as carriers or in any other occupation and the real and personal property of the former is assessed at its actual value in money measured by or with a consideration of his gross earnings, while the real and personal property of the latter is assessed at its value in money measured without regard to its earnings those taxes must be other than uniform so that every person and corporation shall pay
91 a tax in proportion to the value of his, her, or its property.

Under the constitution and laws of South Dakota the assessment of the property of individuals is required to be and is measured by its actual value in money without any consideration of the gross earnings of its respective owners. The constitution commands that "the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property." Section 17 of Chapter 64 of the Laws of South Dakota requires the assessment of the property of express companies to be, and in this case it has been, measured by its actual value in

money with a consideration of the earnings of the company in that State, and no logical or lawful way of escape is perceived from the conclusion that this is not "as near as may be" the same method provided for the assessment of the property of individuals because an assessment of the property of these corporations at their actual value in money without a consideration of their gross earnings might have been prescribed and followed.

The constitution requires taxation to be uniform "so that every person and corporation shall pay a tax in proportion to his, her, or its property." The assessment of the property of individuals is required to be and is measured by its actual value in money without consideration of the gross earnings of its respective owners. Section 17 of Chapter 64 requires the assessment of the property of express companies to be, and in this case it has been, measured by its actual value in money with a consideration of the earnings of the companies and a substantially uniform tax of 28 mills on the dollar has been levied upon these assessments. Taxes so raised cannot be uniform so that every person and corporation shall pay a tax in proportion to his, her, or its property and no doubt remains that the portion of Section 17 of Chapter 64 which required the Board to take into consideration the gross earnings of express companies within the state in making assessments of their property for taxation violated the Constitution of South Dakota nor that the assessments so made and the taxes levied upon them in 1910 were equally violative of that Constitution, unauthorized and void and that must be the decree in this case.

92 There are other considerations that confirm our minds in this conclusion. The Constitution of South Dakota has been amended since 1910 so that it no longer requires that all taxes shall be "uniform on all real and personal property according to its true value in money" and so that it provides that "gross earnings and net income shall be considered in taxing corporations," amendments clearly not made without just reason.

There were five express companies doing business in South Dakota in 1909 and 1910 under contracts with railroad companies to pay to the latter from 45 per cent to 55 per cent of their gross earnings from the transportation of express business over their lines. As the amounts paid to the railroad companies by the respective express companies were approximately one-half of the amounts of their gross earnings from the transportation of the express business over these railroads in South Dakota the amounts so paid furnished a ready measure of the gross earnings of the respective companies from their transportation business over these railroads. The amount paid to the railroad companies by Wells Fargo and Company was $181,193.72, and its assessment was 1.59 of that amount or $289,877.00. The amount paid to the railroad companies by the American Express Company was $120,689.56, and its assessment was 1.60 of that amount or $193,260.00, and this although the value of the office furniture, fixtures and real estate of the former was reported to be $18,473.98 and the number of miles it operated in South Dakota 1621, while the reported value of the office furniture, fixtures and

real estate of the latter was $9151.73 and the number of miles operated by it in South Dakota 1363. The amount paid the railroad companies by the United States Express Company was $6812.22, and its assessment was 1.59 of that amount or $10,899.00. The amount paid the railroad companies by the Western Express Company was $1507.28, and its assessment was 1.51 of that amount or $2262.00, and the amount paid the railroad companies by the Great Northern Express Company was $6626.47, and its assessment was 1.71 of that amount or $11,278.00. How comes it that the assessments of three of these companies who were doing the larger part of the express business in the state were the same percentage within one per cent of the respective amounts they paid to the railroad companies?

93 There is but one rational explanation of this fact and that is that the Board measured the assessments of these companies by the amounts these companies paid to the railroad companies respectively, that is to say, by their gross earnings from their transportation business over the railroads on the theory that the amounts paid to the railroads were about fifty per cent of their respective gross earnings. It is incredible that the board could have estimated or guessed at the value of the property of these companies in any other way so accurately that their estimates would come within 1/160th of the same percentage of each of the respective amounts which the express companies paid to the railroad companies. There is, it is true, testimony in this record tending to show that in making these assessments the board considered not only (1) the reports of the railroad companies which showed the amounts paid to them by the express companies and the reports of the express companies of their earnings, but also (2) the mileage of their respective systems, (3) the number of their respective offices in the state, (4) the values of their respective furnitures, fixtures, horses, wagons and safes and (5) of other things, they could obtain relevant to the value of their respective properties. But the uniform relation of the assessments of the three principal companies mentioned to the respective amounts they paid to the railroad companies is more persuasive than the testimony of many witnesses that the effect upon the assessments of their property of the consideration of all things except the amounts paid by them to the railroad companies, was negligible, and that those amounts taken as the representatives of one-half of the earnings of these express companies from their transportation business in the state were the real measures of the assessments made upon their property by the board. And when to these compelling facts is added the consideration that there has already been an adjudication after full hearing on the merits that this board measured the assessments it made against these express companies in the preceding year by their earnings indicated by their payments to the railroad companies, no doubt remains that the assessments under consideration were measured by the earnings of the companies and not by the value of their property in money, and the conclusion that they are unconstitutional and void becomes irresistible.

Finally counsel for the defendant argue, as we understand their

94 brief, that although the law under which the assessments were made is unconstitutional and the assessments and taxes are void still the plaintiffs are entitled to no injunction against their collection, (1) because they failed to state in their reports to the board the value of all their property in the state or used in the state as required by Subdivision 5 of Section 16 of Chapter 64 of the Laws of South Dakota of 1907; but their failure so to do, if they so failed, and there is positive and persuasive testimony in the record that they did not, is not such iniquity as repels a plaintiff from the precincts of a court of equity, (2) because neither mere illegality, nor irregularity, nor injustice is sufficient to sustain an injunction to restrain the collection of a tax; but these taxes are not irregular, or illegal, or unjust only. The record has convinced that they are unjust and excessive, that they are irregular and unlawful, but they are also unconstitutional and void, and their collection would constitute a taking of the property of the plaintiffs without due process of law in violation of the national constitution, and the action of the board in making the assessments and levying the taxes was either a gross mistake equivalent to a fraud or an actual fraud, and mistake and fraud are immemorial grounds of equity jurisdiction, (3) because the plaintiffs have an adequate remedy at law; but this is the second time this board has made in the same way unlawful assessments of the property of these plaintiffs which effect an unjust and unconstitutional discrimination in taxation against them and their property. Its action has been systematic and repeated and a systematic, repeated continuing violation of the constitution or the law to the injury of a plaintiff like a continuing trespass, presents ample reason for an injunction against its continuance. Atchison, Topeka & Santa Fe Ry. Co. v. Sullivan, 173 Fed. 456, 471; Cummings v. National Bank, 101 U. S. 153, 158; Raymond v. Chicago Traction Company, 207 U. S. 20, 36, 37; Railroad and Telephone Companies v. State Board of Equalizers (C. C.) 85 Fed. 302, 307, 318; Fargo v. Hart, 193 U. S. 490, 503; Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 391; Nashville, C. & St. L. Ry. v. Taylor (C. C.) 86 Fed. 168, 184; Louisville Trust Company v. Stone, 107 Fed. 305, 46 C. C. A. 299, (4) because the plaintiffs have an adequate remedy at law; but the plaintiffs now have and are entitled, as against these unconstitutional taxes, to the right to keep the amount required to pay them. The rights of the parties have been litigated and determined. The only remedy at law the plaintiffs have

95 is either to defend against a proceeding to collect the taxes on the same grounds which have been presented and sustained in these suits, or to pay the amounts of these taxes under protest and bring actions at law to recover them back. Neither of these remedies is as prompt, as certain, or as complete as the immediate decree of this court and its injunction to which the plaintiffs have established their right in this litigation.

The decrees below must be reversed and the cases must be remanded to the court below with instructions to render decrees for the plaintiffs in accordance with the views expressed in this opinion.

Filed April 24, 1914.

96 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term 1914.

No. 4039.

WELLS FARGO AND COMPANY, Appellant,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota.

Appeal from the District Court of the United States for the District of South Dakota.

MONDAY, May 4, 1914.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Wells Fargo and Company have and recover against George G. Johnson, as Treasurer of the State of South Dakota the sum of One Hundred Fifty-two and 50/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to render a decree for the complainant in accordance with the views expressed in the opinion of this Court.

May 4, 1914.

97 (*Petition for and Order Allowing Appeal to the Supreme Court, U. S.*)

The above named Defendant conceiving himself aggrieved by the Judgment of Reversal rendered and entered by the United States Circuit Court of Appeals for the Eighth Circuit on the 24th day of April, 1914 in the above entitled cause and by the Mandate issued out of said Court in this cause on the 11th day of July, 1914, does hereby appeal from said Judgment, Decree and Order to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, a d he prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said Judgment, Decree and Order was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROYAL C. JOHNSON,
Attorney General of South Dakota, and
L. T. BOUCHER,
Solicitors for Defendant Appellant.

Dated at Aberdeen, S. D., August 7th, 1914.

The foregoing Petition for Appeal is granted, and the claim of appeal therein made is allowed.

Done in open Court this 7th day of September, 1914.

JOHN E. CARLAND,
Judge of United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1914.

(*Assignment of Errors on Appeal to the Supreme Court, U. S.*)

Now comes the Defendant above named and filed the following Assignment of Errors upon which he will rely in his appeal from the Judgment rendered by this Honorable Court on the 24th day of April, 1914; and the Mandate issued by this Honorable Court in this cause on the 11th day of July, 1914, and says that there is manifest errors in the Proceedings and Judgment of the United
98 States Circuit Court of Appeals of the Eighth Circuit, and that the Court erred therein in the following particulars, to-wit:

1.

In holding and deciding that the collection of the tax which this action was brought to enjoin would constitute a taking of the property of the Plaintiff without due process of law in violation of the National Constitution.

2.

In holding and deciding that the granting of the Writ of Injunction directly restraining the Defendant from collecting the tax in question would not be in violation of Section 3224, Revised Statutes of the United States which provides that, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

3.

In deciding and holding that Section 17 of Chapter 64, Laws of 1907 of South Dakota is in violation of Section 2 of Article 11 and Section 17 Article 6, South Dakota Constitution, and void.

4.

In deciding and holding that the Board of Assessment & Equalization had no right to consider the earning power of the Plaintiff's property in the State as a going concern or plant in ascertaining its actual value, but that the lawful measure of the value of such property is the selling value of the property: The amount that can be realized in money by a sale of it within a reasonable time.

5.

In deciding and holding that the State Board of Assessment and Equalization in making assessment upon the property of the Plain-

tiff for the year 1910, had no authority to take into consideration the business transacted by the Plaintiff in the State, or its gross or net income in the State, and that such method was not, "As near as may be", the same method provided for the assessment of the property of individuals, because an assessment of the property of the Plaintiff corporation at its actual value in money without a consideration of its gross earnings might have been prescribed and followed.

99 6.

In deciding and holding that this is a case for the exercise of Equity Jurisdiction.

7.

In deciding and holding that the tax imposed on the property of the Plaintiff by the State Board of Assessment and Equalization for the year 1910 was unjust, excessive and unlawful; and that the action of the Board in making the assessment and imposing the tax was either a gross mistake equivalent to a fraud, or an actual fraud.

8.

In deciding and holding that the Plaintiff had no adequate remedy at law.

9.

In deciding and holding that the Decree of the District Court of the United States for the District of South Dakota, Southern Division, rendered in this cause on April 28th, 1913, should be reversed, and that the Plaintiff was entitled to relief as prayed in its bill of complaint.

10.

That the Court erred in issuing its Mandate of July 11th, 1914, to the United States District Court for the District of South Dakota, directing it to reverse its Decree of April 28th, 1913, and to enter Judgment for the Plaintiff as prayed in its bill of complaint.

In order that the foregoing Assignment of Errors may be and appear of record, the Defendant presents the same to the Court and prays that such disposition be made therewith as is in accordance with law and the Statutes of the United States in such cases made and provided, and the Defendant prays a reversal of said Judgment and Decree made and entered by said United States Circuit Court of Appeals for the Eighth Circuit.

ROYAL C. JOHNSON,
Attorney General of South Dakota, and
L. T. BOUCHER,
Solicitors for Defendant-Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1914.

100 (*Bond on Appeal to the Supreme Court U. S.*)

Know all men by these presents: That we, George G. Johnson as Treasurer for the State of South Dakota, as principal and Northern Casualty Company, a Corporation, as surety, are held and firmly bound unto Wells, Fargo & Company, and unto its successors and assigns in the sum of One Thousand Dollars ($1,000.) to be paid to the said Wells Fargo & Company, and its successors and assigns, to which payment well and truly to be made we bind ourselves jointly and severally and our and each of our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 17th day of August, 1914.

The condition of the above obligation is such that whereas the above *maned* George G. Johnson as Treasurer for the State of South Dakota has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and Decree rendered in the above entitled suit by the United States Circuit Court of Appeals for the Eighth Circuit. Now therefore if the said George G. Johnson as Treasurer for the State of South Dakota, and his successors in office shall prosecute his said appeal to effect and answer all costs that may be adjudged or allowed against him if he shall fail to make his said appeal good, then this obligation to be void, otherwise to remain in full force and effect.

GEORGE G. JOHNSON,
As Treasurer of the State of South Dakota,
By ROYAL C. JOHNSON,
Attorney General of the State of South Dakota, His Attorney.
NORTHERN CASUALTY COMPANY,
By E. S. PETTIJOHN, *Vice-President.*
[SEAL.] E. J. JONES, *Ass't Secretary.*

The foregoing bond is approved this 7th day of September, 1914.

101 JOHN E. CARLAND,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1914.

102 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 4039.

WELLS FARGO & COMPANY, Plaintiff,
vs.
GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Defendant.

Citation on Appeal.

The United States of America to the above-named plaintiff, Wells Fargo & Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, sixty (60) days from and after this citation bears date, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, from a final Judgment signed, filed and entered on the 24th day of April, 1914, in that certain suit, being in equity, original number 628, United States Circuit Court of Appeals number 4039, wherein George G. Johnson as Treasurer of the State of South Dakota is Defendant and you are Plaintiff, to show cause, if any there be, why the Judgment and Decree rendered against the said Defendant, reversing the Decree of the District Court of the United States for the District of South Dakota, Southern Division, made and entered April 28th, 1913, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties
103 in that behalf.

Witness the Honorable John E. Carland, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 7th day of September, A. D. 1914.

JOHN E. CARLAND,
Judge of United States Circuit Court of Appeals, Eighth Circuit.

104 [Endorsed:] No. 4039. Wells Fargo and Company, Appellant, vs. George G. Johnson, as Treasurer, etc. Original Citation on Appeal to Supreme Court U. S. Due service of the within citation admitted this 19th day of September, 1914. Bailey & Voorhees, solicitors for plaintiff. Filed Sep. 24, 1914. John D. Jordan, clerk.

105 (*Stipulation as to Transcript on Appeal to Supreme Court U. S.*)

Whereas the above named appellee, George G. Johnson as Treasurer of the State of South Dakota, has appealed to the Supreme Court of the United States from the judgment filed and entered by the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled suit upon the 24th day of April, 1914, and a præcipe for record on appeal to the Supreme Court having been filed in the said Circuit Court of Appeals on behalf of the said George G. Johnson as Treasurer of the State of South Dakota and a præcipe for additional portions of the record having been filed on behalf of the said Wells Fargo & Company it is hereby stipulated by the said Wells Fargo & Company and by the said George G. Johnson as Treasurer of the State of South Dakota by their respective counsel that both the præcipe for record on appeal filed on behalf of said George G. Johnson as Treasurer of the State of South Dakota and said præcipe for additional portions of the record filed on behalf of said Wells Fargo & Company be and the same are hereby withdrawn and that there shall be incorporated by the clerk of the United States Circuit Court of Appeals into the transcript of the record upon said appeal to the Supreme Court the record in this suit as follows, to-wit:

First, the entire printed transcript of record as filed and printed in the United States Circuit Court of Appeals.

Second, the opinion in this suit of the United States Circuit Court of Appeals written by Hon. Walter H. Sanborn, presiding judge.

Third, the final decree and mandate of the Circuit Court of Appeals.

Fourth, the petition of George G. Johnson as Treasurer of the State of South Dakota for allowance of appeal to Supreme Court.

Fifth, the order of the Circuit Court of Appeals allowing appeal to Supreme Court.

Sixth, the citation on appeal to the Supreme Court and the proof of service thereof.

Seventh, the bond on appeal to the Supreme Court.

106 Eighth, the assignment of errors of George G. Johnson as Treasurer of the State of South Dakota on appeal to the Supreme Court.

Ninth, this stipulation as to the portions of the record which shall constitute the transcript of record on appeal to the Supreme Court.

Tenth, all other orders of the Circuit Court of Appeals made herein.

Eleventh, the certificate of the clerk of the Circuit Court of Appeals to the transcript on appeal.

Dated this 23rd day of October, 1914.

BAILEY & VOORHEES,
Solicitors for Wells Fargo & Company.
ROYAL C. JOHNSON AND
L. T. BOUCHER,
Solicitors for George G. Johnson, as Treasurer of the State of South Dakota.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 29, 1914.

107 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the stipulation of the parties, in a certain cause in said Circuit Court of Appeals wherein Wells Fargo and Company is Appellant and George G. Johnson, as Treasurer of the State of South Dakota, is Appellee, No. 4039, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with admission of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the eleventh day of July, A. D. 1914, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of South Dakota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this second day of November, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 24,431. U. S. Circuit Court Appeals, 8th Circuit. Term No. 687. George G. Johnson, as Treasurer of the State of South Dakota, appellant, vs. Wells Fargo & Company. Filed November 10th, 1914. File No. 24,431.

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE G. JOHNSON AS TREASURER OF THE STATE OF SOUTH DAKOTA, APPELLANT,

vs.

WELLS FARGO & COMPANY, APPELLEE.

MOTION OF APPELLANT TO ADVANCE HEARING ON APPEAL

Now, comes the above named appellant, George G. Johnson as treasurer of the State of South Dakota and moves the court that the hearing of this case be advanced and that said case be set down for hearing at an early date to be designated by the court and respectfully shows unto the court;

That this suit was instituted by the appellee to restrain and enjoin the collection of the taxes assessed and levied against the appellee by the State Board of Assessment and Equalization of the State of South Dakota for the year 1910. Said taxes amounting to the sum of $8,116.56; that upon final hearing in the District Court of the United States for the District of South Dakota the bill of complaint of appellee was dismissed for want of equity; that upon appeal from such decree of dismissal said decree was reversed by the Circuit Court of Appeals for the Eighth Circuit all of which will more fully appear from the opinion of said Circuit Court of Appeals in 120 Fed. Rep. 180; that from the decision of the Circuit Court of Appeals this appeal has been taken to this court.

That this action involves the constitutionality under the provisions of the Constitution of the United States and under the provisions of the Constitution of the State of South Dakota of the statute of the State of South Dakota known as Chapter 64 Laws of 1907, which statute is the statute of the State of South Dakota providing for the assessment and taxation of railroad, telegraph, telephone, express and sleeping car companies and which is the only statute of the State of South Dakota providing for the assessment and taxation of such companies; that in its decision in this action the Circuit Court of Appeals for the Eighth Circuit has held said Chapter 64 of the Laws of South Dakota of 1907 unconstitutional upon the ground that the same is in conflict with the provisions of the Constitution of the State of South Dakota and the tax imposed was in violation of the national constitution; that the result of said decision has been to cast a cloud upon all assessments and levies of taxes upon all railroad, telegraph, telephone, express and sleeping car companies in the State of South Dakota and to impede very seriously

the collection of revenues by the State of South Dakota; that there are pending in the District Court of the United States for the District of South Dakota numerous cases brought by the appellee herein and brought or threatened by various persons, companies and associations taxable under said Chapter 64 of the Laws of 1907 to enjoin the taxes assessed and levied under said Chapter 64, which cases already brought involve large amounts of revenue claimed by the State of South Dakota and involving upwards of $100,000.00; that said suits cannot consistently be brought to a final determination until after the hearing and decision upon this appeal in this court; that other companies and associations taxable under said Chapter 64 Laws of 1907 have since the decision in this case of the Circuit Court of Appeals for the Eighth Circuit neglected and threaten to refuse to pay the taxes levied and assessed against them under said Chapter 64; that the result of said decision of the said Circuit Court of Appeals has been to impede the operations of the State of South Dakota in its collection of revenue from all railroad, telegraph, telephone, express and sleeping car companies and associations and to prevent the collection of taxes from any such association excepting when voluntarily paid; that six similar cases are now pending in the District Court in which the State Treasurer has been temporarily enjoined.

That a final determination of this appeal is of the utmost importance to the State of South Dakota in order that the constitutionality of its revenue laws may be determined by the decisions of this court.

Dated at Pierre, South Dakota, February 16, 1915.

C. C. CALDWELL, Attorney General,
and BOUCHER & JOHNSON,
Solicitors for Appellant.

We do hereby waive notice of hearing of the foregoing motion for the advancement of the hearing of the above entitled suit and do hereby consent that such order be entered therein as to the court shall seem proper upon the showing made in the foregoing motion.

Dated, Sioux Falls, South Dakota, February 16, 1915.

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C. O. BAILEY, J. H. VOORHEES,
and C. L. STOCKTON,
Solicitors for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE G. JOHNSON, AS TREASURER OF THE STATE OF SOUTH DAKOTA, APPELLANT,

vs.

WELLS, FARGO & COMPANY, APPELLEE.

APPELLANT'S BRIEF.

This is an appeal from a decision of the Circuit Court of Appeals, Eighth Circuit, rendered on the 24th day of April, 1914, in this case and its companion case, ~~Wells, Fargo & Company vs. George G. Johnson as Treasurer of the State of South Dakota~~. wells and le

In this brief, ~~James C~~. Fargo, individually ~~and as President of the American Express Company~~, will be referred to as the plaintiff, and George G. Johnson as Treasurer of the State of South Dakota, appellant, will be referred to as the defendant.

This action was commenced in the District Court for the district of South Dakota, to enjoin the defendant from collecting taxes levied against the plaintiff by the state board of assessment and equalization of the state of South Dakota, in the year 1910. The evidence was stipulated and the case tried on the 19th day of February, 1913, resulting in a decision and decree dismissing the bills of complaint for want of equity, and dissolving the temporary injunctions theretofore issued. From that decree of the District Court the plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit, which appeal resulted in a decision of the Circuit Court of Appeals reversing the decision of the District Court, and remanding the case to that Court with instructions to enter decree for the plaintiff, granting the relief prayed for in the plaintiff's complaint. and

The State Board of Assessment ~~of~~ Equalization of the State of South Dakota, at its annual meeting in August, 1910, assessed the property of the plaintiff for taxation at the sum of $289,877.00, and levied upon said assessment a tax of 28 mills, amounting to $8,116.56. The value of the tangible property of the plaintiff in the state of South Dakota, on May 1st, 1910, the date with reference to which the statute required the assessment to be made, was claimed by the plaintiff's witness to be $18,473.98, and the plaintiff tendered to the state treasurer an amount equivalent to a tax of 28 mills upon that sum. The tender was refused, whereupon the plaintiff brought this action.

For the convenience of the Court, the sections of the constitution of South Dakota, in force in 1910, to-wit, section 17 of Article 6, and section 2 of Article 11, together with the statute involved, chapter 64 of the Laws of 1907, which, barring some minor additions not material to this case, was, at least so far as it relates to the assessment and taxation of the property of express companies, a re-enactment of sections 65 and 66 of chapter 14, Laws of 1891, will be printed in an appendix hereto. The appendix will also contain for the convenience of the Court, a re-print of the only decision of the Supreme Court of South Dakota upon this law, being the case of American Express Company vs. State Board of Assessment and Equalization, reported in 3 South Dakota, 339, and 53 Northwestern, 192. For specification of errors, see appendix.

Section 17 of the Laws of 1907 added to section 66 of the Laws of 1891 the following words:

> "And for the purpose of aiding the state board of assessment and equalization in assessing the value of the property of such companies, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each express and sleeping car company in this state, and to make an estimate of said value and to make and file with the state auditor on or before the first day of July of each year, a written and detailed report of such information, facts and estimate."

Perhaps no better statement of the issues involved here can be made than to quote from the opening paragraphs of the opinion of the Court of Appeals written by his Honor Judge Sanborn, viz:

> "The plaintiffs are express companies and they claim that the assessment of their property made by the board in 1909 and 1910, on which it levied the tax in those years, were made in violation of the constitution of the state of South Dakota, in that in making them it took into consideration their earnings in the state, while the earnings of the great majority of the tax payers of the state were not considered in assessing their property for taxation; that these assessments were made in violation of the statute of that state in that the board based them on a certain percentage of the respective amounts the plaintiffs paid to the railroad companies for transportation services in South Dakota, instead of finding them on the value of their personal and real properties."

After quoting the taxation sections of the state constitution and referring to the law of 1897, and reciting the evidence

showing the earnings within the state for the year in question, and the assessment made and tax imposed, the Court said:

> "It is admitted in the answer and the testimony for the defendant was that in making these assessments of the plaintiff's property the board considered, among other things, the earnings of and the business done by the companies in the state of South Dakota, and defendant's counsel in their brief to this Court, say: 'As has been said, the board of assessment of South Dakota did consider, among other things, the income of appellant, so far as they could ascertain it, the contracts of appellant, the uses to which its property was put, and the intangible as well as the tangible assets in this state, in fixing this valuation. If this was wrong, then the tax must fall; but we contend it was not wrong.'"

After quoting from the brief of the defendant as above, the Court further said:

> "It is conceded that the board was without either constitutional or statutory authority to tax either the gross or net earnings of the company in the state of South Dakota, in lieu of all other taxes, or of taxes on its property, and that the limit of its lawful power was to assess and tax its real and personal property according to its value in money. * * * So that every person and corporation shall pay a tax in proportion to the value of his, her or its property, as the constitution requires. The value of real and personal property in money, is the amount that can be realized from it by a sale of it within a reasonable time, and that is the valuation at which the legal assessors were required to assess, and presumptively did assess the property of individuals and of the vast majority of the tax payers in the state of South Dakota. Counsel argue that the assessors of such property are not prohibited from considering the earning value of that property for the purpose of ascertaining its value, but this contention is fallacious and relevant in this case. In the first case, while such assessors doubtless did consider the rental value, and in that sense the earning power of some kinds of real and personal property, it is common knowledge that the customary and lawful measure of the value of such property which they use, is the selling value of the property, and, in the second place, it was not the earning power of the plaintiff's property in South Dakota that the board considered as a measure of its value, but

the earnings of the plaintiffs themselves,—the earnings of the owners of the property."

It will thus be seen that the controlling question in this case is whether or not the state board of assessment and equalization had a lawful right to consider among other things the income of the plaintiff in the state, so far as they could ascertain it, and the contracts of plaintiff with the railway companies, in fixing a valuation upon its property or system within the state, for the purpose of taxation. There is another question involved: Whether this is a case for equitable cognizance, it having always been the contention of the defendant that this is not a case wherein a right of injunction should issue in any event. That question will be discussed later.

The rule announced by the Court of Appeals, that the assessing board in fixing the valuation of the plaintiff's property for taxation, could not consider the plaintiff's income in the state, but was confined to a finding of the value of the property in money by finding "the amount that can be realized from it by a sale of it within a reasonable time," would seem to be not only somewhat harsh, but would impose upon an assessment board a duty not always possible to perform.

It is true in a sense, that property is worth what it will sell for within a reasonable time, but that is not always true of any property, and is never true as to some property. Express company systems are not being sold on the market every day or year, except that their stocks and bonds to some extent change hands on the open boards of trade when listed, and that part of an express company's plant or system lying within a given state is never sold. So that if the state board of assessment should be required by law to ascertain what that part of the plaintiff's plant or system within the state, including its contracts with the railway companies, its property, tangible and intangible, would sell for within a reasonable time, it would be impossible for the board of assessment to comply with the law. Most of the property of individuals, real or personal, has a fairly well known selling value from day to day and year to year; such staples, for instance, as wheat, corn, beef, pork, cattle, horses, lands, merchandise stocks of all kinds, have a fairly well known and understood selling value, because sales are being made in such properties day by day. Therefore, it would be no hardship or inconvenience even upon an assessor to ascertain the selling price of such things, and assess them for taxation upon that well known selling price, but as has been indicated this cannot be done in the case of such a property as the plaintiff's, which

consists not only of real, personal and mixed property, but of property that is intangible as well as tangible. In the commercial world the selling value of a thing is often fixed by the income it can be made to produce, and it does not follow that the fixing of the value of a thing in that way is tantamount to putting the value on the earnings of the owners of the property. The owners of such a property as that of the plaintiff's, in South Dakota, do not earn its income. They are not supposed even to be in South Dakota; they are scattered about the United States and Europe. They simply own the stock, receive the dividends, if any, which the system earns, after deducting the cost of operation, and fixed charges; hence it was not quite logical to hold that because the board of assessment considered the income of the plaintiff's system in the state, in fixing its value for taxation, that it imposed an assessment upon the earnings of the plaintiffs themselves—the earnings of the owners of the property. Some decisions which may be deemed pertinent to this case are:

State Railway Tax Taxes, 92 U. S. 575.
Western Union vs. Atty. Gen. Mass., 125 U. S. 530.
Postal Telegraph Co. vs. Adams, 155 U. S. 688.
Adams Express Co. vs. Ohio Auditor, 166 U. S. 185-224.
Pittsburgh Ry. Co. vs. Backus, 154 U. S. 421.
Fargo vs. Hart, 193 U. S. 490.
Western Union vs. Taggert, 163 U. S. 1.
Atchison Ry. Co. vs. Sullivan, 173 Fed. 464. (Eighth Circuit Court.)
Munn v. Illinois, 94 U. S. 113.
Pullman Palace Car Co. vs. Penn., 141 U. S. 18.
Hotel Co. vs. Los Angeles, 211 U. S. 123-281.
Fayerweather vs. Rich, 195 U. S. 276.
Cleveland Ry. Co. vs. Bachus, 154 U. S. 445.
Adams Express Co. vs. Ohio, 165 U. S. 221.
Missouri vs. Dockery, 191 U. S. 170.
Adams Express Co. vs. Poe, 64 Fed. 9.
Land vs. Gowan, 48 Fed. 771.
Maish vs. Arizona, 164 U. S. 599.
Ogden vs. Armstrong, 108 U. S. 224.
C. B. & Q. Ry. Co. vs. Babcock, 204 U. S. 585.
U. S. Express Co. vs. Minnesota, 223 U. S. 335, 56 L. Ed. 459. Reported also in 32 Supreme Court Rep. 210.

On the question of whether injunction is the proper remedy in any event, the Court's attention is called to

Dawes vs. Chicago, 11 Wall. 108.
Snyder vs. Marks, 109 U. S. 193.
Taylor vs. Peoria County, 92 U. S. 575.

Tennessee vs. Sneed, 96 U. S. 69.

Section 3224, Revised Statutes U. S. compiled statutes 1901, page 2028, which is as follows:

"No suit for the purpose of restraining the assessment or collection of any tax, shall be maintained in any court."

Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481, 57 L. Ed. 1289.

The latest expression of the Court upon the matter of the taxation of the property of express companies by a state, is given in United Express Company vs. Minnesota. While that case is not parallel, it is deemed to be controlling in this case. Every reason given for sustaining the Minnesota assessment, applies to this case, and there are many reasons why the assessment in this case should be sustained even though the Minnesota assessment had been adjudged to be invalid.

Before the decision in the Minnesota case, lawyers could with plausibility, contend that any tax which was based upon the income of such corporation, was logically an income tax and not a property tax. No such contention can with propriety be made at this time.

It is quite true that the South Dakota constitution does not provide for an income tax or earnings tax upon express companies, as did the constitution of Minnesota. Neither does the statute of South Dakota provide for an income tax or gross earnings tax upon express companies. In this case, however, the evidence is substantially undisputed, that no income tax or gross earnings tax was imposed. Section 6 of Chapter 309, Minnesota Laws of 1897, provided for a 3 per cent tax upon the gross earnings of express companies. This rate was raised to 6 per cent in 1901. (Minnesota Statute, Sec. 1019.) That section provided:

> "That the auditor shall assess upon each company a tax of 6 per cent upon its gross receipts for business done in the state for the preceding calendar year, as determined by the auditor, which shall be *in lieu of all taxes upon its property.*"

Construing that statute, the Supreme Court of Minnesota in State vs. United States Express Company, 131 N. W. 489, held that

> "The gross earnings tax provided by Revised Laws, Sections 1013 to 1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state."

That Court said:

"If the gross earnings tax law is to be construed as a tax upon gross earnings, admittedly a tax upon the earnings of interstate shipments is an interference with interstate commerce; but if such law does not authorize a tax upon gross earnings, if it is a tax upon the property of the corporation within the state, its gross earnings within the state being merely a measure or method of arriving at the value of its property within the state for taxation, it is equally clear that there is no interference with interstate commerce, and the legislature has not acted beyond its power. There is nothing in the constitution or laws of the United States which forbids the state to tax property which is within its borders, merely because it is employed in interstate or foreign commerce.

"It has long been settled by the decisions of this court, that the gross earnings tax laws were not intended to change the character of the tax, but for the purpose of certainty, were intended to change the method of computation. The amount required to be paid remains a tax upon the property, and not against the corporation. The gross earnings tax is a system by which the amount of tax upon the property is determined."

This Court sustained the Minnesota decision without dissent. In the opinion in that case, Mr. Justice Day said, at page 342:

"It is thoroughly well settled in this court that said laws may not burden interstate commerce; such taxation has been uniformly condemned. Examples of cases of that character may be found in Fargo vs. Michigan, (and other cases cited).

"While we have no disposition to detract from the authority of these decisions, that court has also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce." (Citing cases.)

" * * * A question in principle not unlike the one here presented, came before this court in Flint vs. Stone-Tracy Company. In that case it was contended that the income of the corporations sought to be taxed under the

Federal law, included, as to some of the companies, large investments in municipal bonds and other securities beyond the federal power of taxation. It was held after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the federal government, it might be measured, in part, by the income from property not in itself taxable, and a distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power, and to measure a legitimate tax by income derived in part, at least, from the use of such property."

In Maine vs. Grand Trunk R. Co., Mr. Justice Holmes, speaking for the Court, said:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution."

Continuing, Mr. Justice Day said:

"In the Galveston case the Statute of Texas was condemned because it appeared to the court to be an attempt to reach the receipts of interstate commerce by a tax on 1 per cent of what was equal to the same thing on gross receipts arising from such commerce, when it appeared from the judgment of the state court and the argument on behalf of the state *that another tax on the property* had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax, or in any way helped by the words 'equal to.'

"Upon like reasoning the statute of Oklahoma was condemned in the case of Meyer vs. Wells, Fargo & Co., decided today.

"Appreciating the difficulty emphasized in the Galveston case of drawing the line between cases that burden interstate commerce, and those whereby the legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax *measured by the gross earnings* within the state, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in

force in Minnesota, passed under the authority of the state constitution, and was intended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

"The statute itself provides that the assessments under it *'shall be in lieu of all taxes upon its property.'* In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in McHenry vs. Alford, while it was not necessary to the decision of the case, is nevertheless appropriate: 'When it is said, as it is in this act, that the tax collected by this method *shall be in lieu of all other taxes whatever*, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings.'

"The tax in the present case is not like those held invalid in the Galveston case and the Oklahoma case, *being in addition to other state taxation reaching the property of all kinds* of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce, but as in the Maine case, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of the interstate commerce. The property of the express companies being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in Adams Express Company vs. Ohio State Auditor, to sustain a tax upon the property of an express company, which property was considered a part of one money-making organization extending through many states."

In conclusion the Court said:

> "We think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part of proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state. We find no error in the judgment of the Supreme Court of the State of Minnesota, and it is affirmed."

Plaintiff's counsel have suggested that the principle announced by Mr. Justice Day in the Minnesota case, is not pertinent to this case for the reason that the constitution of South Dakota has not provided for the imposition of an income tax upon express companies or other public service corporations. It is believed that this suggestion is without merit, for the reason that the South Dakota statute does not impose an income tax, and for the further reason that the board of assessment and equalization did not impose an income tax or a tax upon the gross or net earnings of the appellant in South Dakota, and there is no evidence in the case from which it could be fairly said that they attempted to do so.

In this connection the Court's attention is called again to the reading of Section 17 of the South Dakota laws:

> "The state board of assessment and equalization shall, on the first Monday of July, each year, assess all the property of every express and sleeping car company doing business in this state, and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state, for the year ending on the 30th day of April, preceding, the statements made by said companies and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals."

Section 19 of the South Dakota Act is as follows:

> "Each express and sleeping car company so assessed, shall, on or before the first day of March of each year, pay to the state treasurer the amount of tax levied on its property for the year preceding, *which shall be in lieu of all other taxes.*"

Certainly there was no necessity for a constitutional pro-

vision authorizing the imposition of an income tax to justify the enactment of the sections just cited. If the constitution of South Dakota contained a provision authorizing the imposition of an income tax upon express companies and other public service corporations, no lawyer could fairly contend that the statute above cited was intended to carry out such a constitutional provision. There is no evidence that the board of assessment and equalization violated the statute; there is no evidence of fraud; there is no evidence that the assessment was erroneous in point of law, either because the asssing board adopted some inadmissible basis in mak'ng it, or because they have disregarded any of the mandatory provisions of the statute on which parties assessed have a right to rely.

The evidence in this case, except on the mere question of values, is substantially undisputed. It was impossible for the trial court to find otherwise than it did on the evidence before it, unless it had taken upon itself to go behind the board of assessment on the question of the value of the plaintiff's property within the state, and this it could not do without flying in the face of the repeated decisions of this Court, which have uniformly been that upon the question of value, the determination of the special tribunal lawfully made, is always conclusive, and cannot be overthrown by evidence going only to show that the value was otherwise than as determined.

From the railway tax cases in 92 U. S., to the latest case cited in this brief, this Court has uniformly held that when a state board of assessment and equalization, state tax commission or by whatever name the body may be called in its day, upon which has been conferred the final power of assessment and equalization, has determined the value of property within the state, in the absence of fraud or an unconstitutional law, the determination of that board on the question of value, is of necessity final, and that no power exists in the courts to review or in any manner interfere with or modify that finding of fact.

Speaking of powers of such boards, Mr. Justice Holmes, in the Burlington case, 204 U. S., at page 598, says:

> "The state has confided those rights to its protection, and has entrusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

In American Express Company vs. Board of Assessment and Equalization, 3 S. D., Judge Corson, speaking for the Court on this point, said:

"But the law has imposed the duty of determining what is a just and equitable assessment, upon the state board of assessment and equalization, and has not conferred upon this court the power to review and revise the judgment of the state board upon that question. This court cannot substitute its own judgment for that of the board of assessment and equalization, as to what is the assessable value of the relators property in this state. By its assessment the board has affirmed that the true value of the property of the relator is $35,000.00. In fixing its value, the board had before it such evidence as the law requires, and its decision is binding and conclusive upon this court."

Upon no other matter was there any conflicting testimony, unless it would be the testimony of plaintiff's witness, Mr. Naylor (record page 25), disputing the accuracy of the returns made by the railroad companies to the state auditor of South Dakota, of the amounts received from express service in the State of South Dakota for the year ending April 30th, 1910.

On the other hand, the plaintiff proved by H. B. Anderson, the state auditor (record page 26), that upon the 27th day of July, 1910, the state board of assessment and equalization of South Dakota, fixed a valuation *upon the property of the plaintiff* for taxation, for the year 1910, in the sum of $289,877.00. The defendant offered the testimony of the former state auditor, Mr. John Hirning, which stands undisputed in the record, that the plaintiff refused to report the total value of all its property in the state. (Record page 31.) Further, that the plaintiff did not report or give any figures or estimate covering the value or number of any horses, vehicles and stable equipment owned or used by it in this state; further, that the company did not report its income in this state derived by operations other than transportation, while its report for the same year to the state board of railway commissioners of this state (record page 37) showed that it derived revenues on its lines from operations other than transportation, consisting of brokerage fees, commission department, money orders, travelers' cheques, C. O. D. checks, telegraph transfers, and letters of credit. Further, that in its said annual statement to the board of assessment and equalization for the year ending April 30th, 1910, the plaintiff gave the value of its office furniture fixtures and real estate at $18,473.98, but it gave no value, figures, statement or estimate of value upon any other property whatever, either tangible or intangible; further, that in making the assessment for the

year 1910 upon the property of the company in this state, he, and as he believed, the other members of the state board of assessment and equalization, considered, among other things, the reports and annual statements of the plaintiff company, the reports of the railway companies, the reports and records of the railway commissioners, the contracts for express privileges of the company in this state, the earnings of the company in this state, the various lines of business done by the company in this state, the length of the company's system in this state, the number of its offices, the bulk and value of its fugitive property in this state, not reported by it in its annual statement to the board, the total value of its property, tangible and intangible, in this state; the business done by the company in this state, the amount of money which in the judgment of the witness and other members of the board, must have been necessary to carry on the various lines of the company's business in the state, and all other facts which he or the members of the board could obtain, tending to throw light upon the question of the total value of the company's property in this state, tangible or intangible.

That the state board of assessment and equalization did not assess the company upon its total gross income or expense of operation, or upon its total net income derived from its business in this state and elsewhere, or upon its net disbursements for operation in this state and elsewhere. Further, that the state board of assessment and equalization could not have made an assessment upon the company or its property, based upon its income or disbursements, either net or gross, if it had desired to do so, because of the fact that it was impossible for the board of assessment and equalization to ascertain, and it did not ascertain the total income or disbursements of said company in this state for said year, or any other year, or its net income or disbursements for said year or any other year, in this state.

Further, that he never had or entered into any contract, agreement, conspiracy or understanding with the other members of the board of assessment and equalization in 1910, or in any other year, or with any member thereto, to disregard in any way the value or amount of the company's property, in making the assessment for the year of 1910, or any other year, and that he never at any time while he was a member of the board of assessment and equalization, entered into any agreement or contract or conspiracy or understanding with the other members of the board of assessment and equalization, or any of them, to assess the plaintiff company upon its income or upon its disbursements, either gross or net, and he knows of no such an agreement, contract, understanding or

conspiracy, and believes there was none, but that he as well as the other members of the board earnestly endeavored to obtain what information they could to ascertain the true value of the company's property in this state, tangible and intangible, and to make a just and equitable assessment of said property in the same ratio as the property of individuals.

Further, that he and the board of assessment and equalization did to the best of their ability, make a just and equitable assessment of said property in the same ratio as the property of individuals; that if a mistake occurred it was because of the fact that the company neglected to furnish the witness or the state board of assessment and equalization its own estimate of the total property owned by it in this state, or used by it in this state.

As has been said, the testimony of this witness stands undisputed. Parts of his testimony were objected to, and, perhaps under ordinary circumstances, would have been objectionable under the rule announced in C. B. & Q. Ry. Co. vs. Babcock, 204 U. S. 585; but, considering the attack made upon the board of assessment and equalization in the plaintiff's bill of complaint, and the assertions made in the bill of complaint, that the assessment was irregular and was based on their income, it would seem that the bulk of the testimony of this witness, at least, was quite proper.

If it should be considered that the testimony of the former state auditor, Mr. Hirning, was not properly received under the circumstances, then this feature of the case would stand upon the legal presumptions, and as the plaintiff did not see fit to offer any evidence of the record or minutes of the meeting of the board of assessment and equalization, at which the assessment in controversy was made, the legal presumption must be that those officers of the law did their duty under the law; that in making the assessment upon the property of the plaintiff, they did so in the manner provided by law; that they considered all of the things that they had a lawful right to consider under the statute, and disregarded all things which they had no right to consider under the statute. Whether we rely upon the testimony of the former state auditor, Mr. Hirning, or upon the legal presumptions, which, in the absence of competent evidence to the contrary, always obtain as to the propriety and validity of the official acts of such bodies.

The record fails to disclose that the board of assessment and equalization in any manner or to any extent exceeded its jurisdiction or adopted any basis or method not authorized by the statute in arriving at its judgment touching the value of

the plaintiff's property in South Dakota for the purpose of taxation.

If Mr. Hirning's testimony is competent, then it clearly and satisfactorily appears affirmatively without the aid of any legal presumption that in making the assessment and levy the board of assessment and equalization, in reaching their judgment, adopted precisely the method authorized by the statute and indorsed by the Supreme Court of the state heretofore referred to.

Touching that point, the state Supreme Court said:

> "It is insisted that the board had no right to take into consideration the contracts of relator with the railroad companies in fixing the value of the property and making its assessment. What provision of the law prohibits the board from taking such contracts into consideration? We have not been able to discover any; but, on the other hand, we find that the board is authorized to take into consideration *any and all matters that will enable them to make a just and equitable assessment.* The law has placed no limitations upon the board as to the matters they shall take into consideration, and we certainly can impose none."

The Court's attention is again called to Section 16 of the statute in question. There are five subdivisions of that section which set forth in detail the information which express companies are required to transmit annually to the state auditor. The fifth sub-division requires them to transmit a statement showing the gross earnings of the total business of such company transacted within the state for the year ending April 30th, preceding, and the value of all the property of such company used in the state. What was the intention of the legislature in requiring this statement of the gross earnings of the total business of said company transacted within the state? Obviously it was not for the purpose of authorizing the board of assessment and equalization to impose an income tax, for Sections 16 and 17, taken together, show clearly that the intention of the legislature was to impose a property tax. Clearly it was the intention of the legislature that the board of assessment and equalization, when it come to assess the property of express companies in this state, for the purpose of taxation, should have before it some knowledge of the earning capacity of the express company's property in the state, taken as a system or a money making concern, and that they should use that knowledge *as a measure of value.* ~~This is clear from the fact that~~ Sub-division 5 of Section 16, ~~requiring the revision of~~ Section 17, that the board in assess-

ing the property of the express companies doing business in the state, "shall take into consideration the gross earnings of said company within the state, for the year ending on the 30th day of April preceding, and all other matters necessary to enable them to make a just and equitable assessment of said property."

It is contended, therefore, that even if there has been evidence offered and received, proving to a demonstration that the tax imposed upon the plaintiff's property and the property of other express companies in the state has amounted to a certain percentage of the gross or net income of each company for the preceding year, that fact would not, under the decisions, justify a holding that the tax imposed was an income tax and not a property tax, because it could still be a property tax under the rule announced in the Minnesota case, imposed in lieu of all other taxes.

As a matter of fact, however, it was not shown that the tax imposed upon any express company in 1910 amounted to a specific percentage of its income, either gross or net. There is no evidence to show that the board of assessment and equalization ever exactly ascertained what was the gross or net income in this state or elsewhere of the plaintiff company, or any other express company. It cannot be ascertained from the record what the gross or net income of the plaintiff company, or any other express company, really was for the year ending April 30th, 1910.

At the trial, counsel for the plaintiff evolved a so-called mathematical demonstration whereby they endeavored to show, by the way of argument, that the tax imposed upon nearly every express company for the year 1910 amounted to 4 1-2 per cent upon the several amounts paid by the express companies to the railways for the transportation of packages. That mathematical demonstration failed to demonstrate, and if it had been entirely successful, it would not have been any proof, that the tax imposed was 4 1-2 per cent or any other per cent of the income of the companies, because there is enough evidence in the record to show byond dispute that the respective amounts which the express companies paid to the railroad companies for the transportation of packages was no indication of the actual gross or net incomes of these companies from their total business done within the state. This will be evident when the court comes to consider the undisputed fact that these companies did a large amount of business in the state which it is not claimed was divided with the railroads. They did a brokerage business, C. O. D., return check business, and money order business, a travelers' cheque and letter of credit business, all of which, so far as the record

shows, at least, was separate and distinct from their business done with the railroad companies.

So the most that can be said of this mathematical demonstration, had it demonstrated, would be that the amount of the tax imposed was tantamount to 4 1-2 per cent, not upon the gross incomes of the company, or the net income of the companies which the record shows to be an unknown quantity, but upon the amount of money paid to the railroads for the transportation of packages. In other words, that the tax imposed amounted to a certain percentage upon a certain line of disbursements of the preceding year; but even so, the fact remains, under the broad general principle announced in the Minnesota case and other cases, that a tax so imposed is nevertheless a property tax and not an income tax, and what reason is there to believe that the Minnesota tax was a property tax ,and that the South Dakota tax was not a property tax, but in legal effect a tax on income?

It is true that in the 1909 cases the district court for South Dakota, by Mr. Justice Willard, held on the evidence in that case, which, by the way, was materially different from the evidence in these cases, that the tax imposed in 1909 cases was in legal effect an income tax and void.

It must be remembered that the decision in the 1909 cases was rendered some six months prior to the decision of the Supreme Court in the Minnesota case. The entire reasoning of Mr. Justice Willard in the 1909 cases was in conflict with the reasoning of the Supreme Court in the Minnesota case. In the 1909 cases, Mr. Justice Willard, in speaking of that assessment, said:

> "They in fact abandoned not only the constitution, but the law, and instead of making an assessment upon the property, tangible and intangible, of the express companies, they undertook to tax the company upon its earnings * * *. They never made any determination at all of the value of the property of the companies. * * * It was prohibited from taxing those companies by reference exclusively to their gross earnings. * * * What would be said of the board of assessors of a county who, in determining the tax that should be paid by a farmer, should take into consideration the gross earnings of his farm for the year preceding, saying that such a farm as that ought to pay 4 per cent on those gross earnings, and having taken the rate of 25 mills to determine what his assessment should be, should then assess his farm and his stock and machinery upon that basis?"

It is respectfully suggested that this reasoning of Mr. Justice Willard was out of line with the reasoning of the Su-

preme Court, both of South Dakota and of the United States. It eliminates the thought expressed by Mr. Justice Day that in assessing the property of a corporation, its annual income within the state is a proper yard-stick or measure of value by which to determine the value of the assets of the corporation within the state, for the purpose of taxation. It disregards, or at least overlooks, the opinion of the Supreme Court of South Dakota, wherein that Court held, in the case above cited, that:

> "The board of assessment and equalization might take into consideration any and all matters that will enable them to make a just and equitable assessment; that the laws placed no limitation upon the board as to the matters they shall take into consideration, and we certainly can impose none."

Article 10, Section 2, of the State Constitution, provides as follows:

> "All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules, appraisement and assessment *as may be prescribed by the legislature* by general law, so that every person and corporation shall pay a tax in proportion to the value of his or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporations' property, *as near as may be*, by the same methods as are provided for assessing and levying taxes on individual property."

From this section of the constitution it will be observed that the constitution recognizes the difficulty of arranging an equitable plan or system of appraisement and assessment of the property of corporations as distinguished from the property of individuals; and so it gave to the legislature authority to adopt different plans or systems of appraisement or assessment of the property of corporations, requiring only that such different plan or system should come "as near as may be" to the same methods as are provided for assessing and taxing the property of individuals.

While it might be quite true that a board of assessors of a county ought not to fix the value of the farmer's farm, stock and machinery by reference to the farmer's income, according to the illustration of Mr. Justice Willard, it would not follow at all that such a method of determining value would be unlawful or inequable in determining the value of the assets, tangible and intangible, of a corporation. The farmer has none of the rights and privileges of a corporation. He has no

franchise to be and franchise to do. His property is tangible property, while sometimes a large proportion of the property of a corporation is intangible.

Doubtless it was for such reasons as above indicated, as well as many others which could be given, that the constitution saw fit to pass on to the legislature the authority to prescribe the rules of appraisement and assessment of property, with the admonition only that in assessing and taxing the property of corporations they should come "as near as may be" to the method prescribed for taxing the property of individuals; and this, we believe, the legislature has done by the legislation in question; if not, what could come "as near as may be"? It is possible that the statute is a trifle crude; that an experienced lawyer might have improved upon it, but to be able to find fault with the law is not to demonstrate its invalidity.

In Metropolitan Theatre Company vs. Chicago, 33 Supreme Court Reporter, at page 443, Mr. Justice McKenna states this view as follows:

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, and yet be free from judicial inference. The problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernable; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the 14th Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

It is respectfully contended that the statute of South Dakota conflicts with no section of the state constitution or of the constitution of the United States; that the board of assessment and equalization in making these assessments and levying this tax, followed the law, and while they no doubt did to a certain extent fix the value of the plaintiff's assets with reference to its income so far as they had knowledge of it, and with reference to its business done with the railroad companies, using those things in part as a yard-stick or measure of value, they nevertheless properly and lawfully assessed the property of the plaintiff within the state, for the purpose of taxation; and if they did that, it is not for any court to say that the assessment was too high, and, since the decision in the Minnesota case, it is not for any court to say that such a method was unlawful.

There is another matter which goes to the merits of this case: the undisputed evidence was that the plaintiffs have at all times persisted in violating Sub-division 5 of Section 16 of Chapter 64 of the Laws of 1907, in this, at least, that they have persistently refused to report the value of all the property of such company in this state, or used by it in this state. The trial court found this fact to be true, and on the evidence could not find otherwise. By this default the plaintiffs set themselves above the law. They persistently refused to obey the law. This was not an oversight on their part; it was done for a vitally important reason.

As is well known to this court, these companies were having some controversy with the state over the question of rates, and it was important to them that they should not go on record with any statement to the board of assessment and equalization or to the state auditor, as to the total value of all their property used in this state, for the reason that such a record could be used against them in the rate cases. It is suggested to the Court that where a plaintiff does not come into a court of equity with clean hands, but, on the contrary, is shown by the evidence to have wantonly and flagrantly violated the law, he has not placed himself in a proper position to receive equity from the hands of the court, even though it might otherwise appear to the court that he would have been entitled to it. We say flatly that the plaintiffs are open violators of the law of this state, and are not in a position under any circumstances to invoke the aid of equity in these cases.

There can be no question of fraud in these cases, so far as the board of assessment and equalization is concerned. There is no sign or badge of fraud in sight. The board could not do fraudulently a thing it had an unqualified legal right to do. The board simply followed the law and used its best judgment.

IS THE STATUTE UNCONSTITUTIONAL?

As common carrier corporations, express and sleeping car companies are in a class by themselves. They run like railway, telegraph and telephone companies, in that they have no roadbeds or fixed lines of rail or steel. Their tangible property is fugitive in character, and in the very nature of things the legislators of the states must of necessity put them in a class by themselves for the purpose of assessment and taxation. The law of this state has done this, and in so doing has violated no constitutional provision. In their brief address to the Court of Appeals, the counsel for plaintiff presented ten points or reasons why this statute is unconstitu-

tional. Without knowing what points or authorities they may present to this Court, we make answer to their brief as submitted to the court below.

The case of Pingree vs. Auditor General (Michigan), cited by plaintiff, is no precedent here, and is indeed hardly persuasive. That was an application to have taxes collected from telegraph and telephone companies credited to the general fund, and the question was whether or not this tax was a specific tax or a general ad valorem tax. The court held that it was not a specific tax, that it was an ad valorem tax, and further, that it was simply a state tax and could not be applied for any local purposes; could not be divided among the respective counties or localities in the state, and was, therefore, obnoxious to Section 11 of Article 14 of the Michigan constitution.

The gist of that case is explained by the following excerpt from the opinion:

> "It remains to inquire whether this tax can be sustained as an ad valorem tax. We have seen that the constitution requires uniformity of taxation except as to property specifically taxes. Not being a specific tax, this must comply with this requirement, which can hardly be said to do. It is to be assessed according to its cash value, which is a compliance of Section 12; but if assessment as a whole and not locally, and by a state board and not by a local board, as in ordinary cases, can be said to be permissible,—which we do not decide,—the fact remains that the rate is determined in a different way and is different in amount from taxes imposed on the other principle, which contributes to state taxes. We must infer that this is a *state tax*, for it is payable to the state treasurer, *and the law does not provide for its application to local purposes*. The taxes generally assessed for the state bear a proportion to the amount raised, and all taxable property except that paying specific taxes is charged with a given and equal percentum upon its assessed value. That cannot be said of its property, for the rate is to be the average for all taxes raised for all purposes—*local as well as state*. It is not a specific tax, and it is not within the uniform rule of taxation prescribed for other property, and the law providing for it must, therefore, be held void:

It will be noted that the supreme court of Michigan laid special stress upon the fact that the tax in question was a state tax levied with relation to the average rate of taxes general, municipal and local, levied throughout the state during

the previous year, but that the law contained no provision for its application to local purposes. In this connection we desire to call the court's attention to the striking difference between the Michigan statute and the South Dakota statute in this respect. Section 20 of Chapter 64 is as follows:

> "The state treasurer shall apportion the amount of taxes received under the provisions of this act between the state and the various counties in which such company is doing business, as herein provided.
>
> "The amount to which each is entitled shall be determined by the state board of assessment and equalization, and the county treasurer shall distribute the portion received by his county to the various counties and local funds according to the levies made upon other property for the *preceding year.*"

While the third point raised by the plaintiff, in connection with this Michigan case, is, of course, a matter about which lawyers might differ, we submit that unless it is going to be held that any system of taxation of corporation property by state boards of assessment, is unconstitutional, the provision in the South Dakota act that,

> "The tax shall be equal to the average amount of state tax from county, school, municipal, road, bridge, and other local taxes levied upon other property for the preceding year."

is neither unconstitutional or unfair, but on the contrary, when taken in connection with the provisions of Section 20, above quoted, it presents a fair, practical, constitutional and consistent plan for the taxation of the property of such corporations, and that it conforms *"as near as may be"* to the methods provided for the taxation of other property. We say that it is a matter for legislative discretion; that the constitution imposed that power of discretion upon the legislature to arrange a plan for the taxation of property of corporations, not exactly in conformity to the plans for the taxation of the property owners, because that was known to be practically impossible, and we submit that there is no reason why a court should say that the plan adopted by the legislature of South Dakota, in the exercise of its discretion, is not conformable, "as near as may be" to the plan adopted for the taxation of other property.

The fourth point made by the plaintiff is in the nature of a straw man, and the arguments therein contained are, it seems to us, without force, for the reason that the law does not require that the taxes collected from express companies should be apportioned to the various taxing districts in pro-

portion with the mileage of the express companies in those districts. The people of taxing districts, constituting the people of the state, have by law conferred upon the state board of assessment and equalization, by Section 20 of Chapter 64, the duty to determine what proportion of the taxes so collected shall go to the respective taxing districts, and we know of no section of the constitution which prevents the people of the state from conferring that power and duty upon the state board of assessment and equalization. There is no question but what the state board in its discretion, would have a right to consider the length of the plaintiff's systems within each county; the number and size of their offices, and the amount of their tangible property in the several counties and districts, and all of the things enumerated by plaintiff in his fourth argument when they come to determine what proportion of the tax so collected shall go to the respective counties or taxing districts.

The plaintiff's contention in this regard, that such a plan might result in an unfair distribution of the taxes as between the respective counties or taxing districts, is after all, a moot question, so far as *this* case is concerned. A county, city or taxing district might, perhaps in a proper proceeding, raise a question as to whether or not the board had made or was making a fair distribution of the taxes as between it and other taxing districts, but that is not a matter which this court can well consider in this case.

By its fifth point, plaintiff contends that because the revenue laws of South Dakota contain provisions for an appeal to the courts from an action of minor boards of equalization within the state, and makes no provision for an appeal to the courts from the action of the state board of assessment and equalization, that, therefore, Chapter 64 is unconstitutional as depriving the appellants of their property without due process of law.

In reply to that contention, we have to say that all who are assessed by the state board, are treated alike; that there is no section of any constitution which prevents the state from making the decision of the state board of assessment final upon the question of property values. As. Mr. Justice Holmes said in a case hereinbefore referred to: "Somewhere there must be an end." What good end could be subserved by providing for an appeal from the judgment of the state board of assessment and equalization to a judge of some court to pass upon the question of the value of property?

The state has selected this board of public officers to perform this duty, and presumably they are as competent or more competent to pass upon the valuation of these properties

than would be a judge of the Court and certainly there is nothing in the constitution of the state which requires that the legislature should provide for an appeal to the Courts from the decision of any board of equalization. When the legislature saw fit in its legislative discretion, to provide for an appeal from the decision of the board of equalization of a county, they perhaps exercised a wise discretion, but it does not follow that it would have been a wise discretion for them to have provided for an appeal to the courts from a decision of the state board of equalization, and their failure to do so cannot make the law obnoxious to any section of the state constitution, nor to the objection made by plaintiff that it has been deprived of its property without due process of law.

By its sixth and seventh points, plaintiff contends that because Section 22 of Chapter 64 provides for the collection by destraint of the taxes due from it after the expiration of 30 days from the first day of March in any year, and because Section 2185 of the Political Code provides for the collection by destraint of the taxes due from individual tax payers in October, of any year after the tax becames due, that this is an unconstitutional discrimination against express companies; and it makes the further contention that because Section 2192 of the Political Code provides that if any person shall pay one-half of the amount of taxes due from him on or before the first day of March, in the year which said taxes shall have been assessed, the balance shall not become delinquent until the first day of October thereafter, upon which day, if not paid, a penalty of one cent a month thereafter, shall be paid.

In reply to this we have to say that it has never been held that the plaintiff or any other corporation could not take advantage of the one-half payment clause of the statute, and we know of no reason under the law, why it may not do so. It is true that Section 22 of Chapter 64 authorizes the collection of the taxes due from the plaintiff at an earlier date in the year than is authorized for the collection of personal taxes due from individuals, but Section 2192 says that if *any* person shall pay one-half of the amount of taxes due before the first day of March, of the year, etc., the balance shall not become delinquent, etc., until the first of October, and thereafter. The plaintiff is a person either natural or artificial, and we have no doubt would be entitled to the benefits of that statute.

Furthermore, this is another moot question, so far as this case is concerned, as the record does not indicate that plaintiffs ever were denied the benefits to be had under th pro-

visions of the general law, Section 2192. The record shows that the plaintiff never made an offer to pay one-half of its taxes under that section; hence, it is not in position to invoke the decision of this Court upon the question.

Furthermore, there can be nothing in these sections of the statute which are obnoxious to the uniformity clause of the state constitution, because that clause has to do with the assessment and levy, in other words, the imposition of taxes upon property. These sections of the law, to which objection is made, have merely to do with the time and manner in which past due taxes may be collected by the respective officers of the state or county, who have charge of the collection, and that was wholly a matter of legislative discretion, and is not violative of any section of the state constitution.

In its seventh point the plaintiff again constructs a man of straw, and needlessly recites an excerpt from Mr. Justice White in the Owensburg National Bank case, in 173 U. S. 664. In that case Justice White very wisely and aptly said:

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

We sincerely hope that we have said nothing in this case which would justify the citation of that decision by the plaintiff.

For its eighth contention, plaintiff contends that because under the statutes of South Dakota, the property of individuals is assessed by local assessors of the respective counties and municipalities, while the property of the common carrier corporations or companies, is assessed by a state board of assessment. Chapter 64 is in clear violation of the constitutional provisions for the assessing and levying of taxes on all corporation property, as nearly as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

In this connection plaintiff contends that where assessments are made by the local assessment officers, no provision whatever is made for the taking into consideration of the use to which any special item of property is put, or of the income which is obtained from it.

In reply to that point, we have to say that there is nothing in the statutes or the constitution which prevents the local assessing officers from taking into consideration the use to which any special item of property is put, or the income which is obtained from it, and it stands to reason that without any express authority from the legislature given either to a local assessing officer or to a state board of assessment and equal-

ization, any assessing officer or assessing board would, as a matter of course have a perfect right, and it would be their duty when ascertaining the value of any given plant or piece of property, regardless of whether it belonged to an individual or to a corporation, to consider among other things, the earning power of that plant or property in order to arrive at a logical and intelligent determination as to its actual value in money. That is one of the elements which necessarily goes to determine the value of any property used in business of commercial life.

By its ninth point the plaintiff contends that Chapter 64 is obnoxious to Section 21 of Article 3 of the State Constitution, which provides that "no law shall embrace more than one subject which shall be expressed in its title"; the contention being that because that chapter is "an act providing for the assessment and taxation of the property of railway, telegraph, telephone, express and sleeping car companies," it contains more than one subject. We hardly think this contention calls for argument. This clause of our state constitution appears in about every constitution in the country, and as the Court well knows the reports are filled with decisions upon this subject. Without attempting to state their contents, we call the Courts' attention to some of the cases upon this subject:

People vs. Parvin, et al, 14 Pac. 783.
Wicken vs. City, 23 S. D., 556.
Stewart vs. Kirley, 12 S. D., 255.
Becker vs. White River Co., 132 N. W. R. 797.
Dunbar vs. Frazer, 78 Ala. 538.
State vs. Mc Cracken, 42 Texas, 384.
Henrico Co. vs. City, 106 Va. 282.
Freeman's Notes.
State vs. Algood, 86 Am. St. Rep. 270.
Bobel vs. People, 173 Ill. 25.
79 Am. St. Rep. 460 et seq.
Newark vs. Mt. Pleasant Co., 58 N. J. Law, 171.
33 Atlantic 396.

Not only may the subject be as comprehensive as the legislative discretion may choose to make it, but the statute relating to it may include every matter germane to and in furtherance of the general subject or object expressed in the title.

Barksdale vs. Laurens, 58 S. C. 413.
Memphis vs. American Co., 102 Tenn. 336.
Prison Association vs. Ashby, 93 Va. 667.
People vs. Kirk, 162 Ill. 138.

If it should be that chapter 24 is void for being obnoxious,

Section 21, Article 3 of the State Constitution, then the defendant can rely on the law as it stood before its enactment, viz: Articles 6 and 7 Chapter 20 of the Political Code, which was enacted as a Code in 1903; sections 2124 to 2134 of which embrace the law of 1891, which is discussed by Judge Corson in the opinion printed in the appendix.

By its tenth point plaintiff contends that there is no decision of the supreme court of the state of South Dakota which construes Chapter 64 as being constitutional and contends particularly that the decision in State Ex. Rel. American Express Company vs. Board of Assessment and Equalization, 3 S. D., 338, did not do so.

In this we think the counsel for plaintiff is in the main, mistaken. It is quite evident from reading the decision, that all the points which are made here were not presented to that Court; at least in detail. At the same time the Court by that decision certainly did construe the law and upheld it in its opinion on the powers of the board of assessment and equalization acting under it, and we think, therefore, it may fairly be said that the law has been upheld by the supreme court of this state.

By the negligence, perhaps, of defendant's counsel, the Court of Appeals was permitted to obtain a somewhat inaccurate view of the 1912 Amendment to Section 2, Article 11, of the State Constitution. That Amendment consisted in the interpolation into the section of the words: "Franchises and licenses to do business in the state, gross earnings and net incomes, shall be considered in taxing corporations." Otherwise the constitution remains substantially as before.

See Section 17, Article 6, and Sections 2 and 3, Article 11.

It would seem that the amendment to Section 2 in 1912, deals with the taxation of corporations as such, and not with the taxation of the property of corporations. By the constitution and statutes of the state a distinction has always been clearly drawn between the taxation of corporations as such, and the taxation of the property of corporations. This distinction is fully explained by the state supreme court in Queen City Fire Insurance Co. vs. Basford, 130 N. W. 44 (S. D.) Therefore, when the learned Court of Appeals stated in its opinion that:

> "The constitution of South Dakota has been amended since 1910 so that it no longer requires that all taxes shall be 'uniform on all real and personal property according to its value in money,' and so that it provides that 'gross earnings and net incomes shall be considered

> in taxing corporations,' amendments clearly not made without just reason."

It disclosed that it had been mislead into a misunderstanding of the constitution and the meaning and effect of the amendments of 1912.

Clearly, it is not true as stated in the opinion, that "the constitution of South Dakota has been amended since 1910 so that it no longer requires that all taxes should be uniform on all real and personal property according to its true value in money," for the amended Section 2 expressly provides that "all taxes shall be uniform on all property"; that "the value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

In its opinion the learned Court of Appeals well said:

> "It is conceded that the people of a state may, by express provisions in its constitution, authorize their legislature and executive officers to measure the assessable value of the taxable property of a corporation by its gross earnings in the state."

We would add to that statement, this: that a state constitution is not a grant of power; that within its department the legislature has all power not prohibited by the constitution; that it needs no express provision of the constitution to authorize it to do anything; that when it authorized the state board to consider the gross earnings of the plaintiff corporation within the state, and any and all matters necessary to enable them to make a just and equitable assesment of said property, it did what was not prohibited by any section of the constitution, express or implied, but acted strictly within its jurisdiction in the exercise of its legislative judgment and discretion.

THE TENNESSEE CASE CITED BY PLAINTIFF.

The constitution of Tennessee, Section 28, Article 2, provides that:

> "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

It will be noted that the Tennessee Constitution put an arbitrary limitation on the legislature, excepting the power to tax merchants, peddlers and privileges.

The constitution of that state does not contain the South Dakota provision permitting the legislature to establish a different rule for assessing and levying taxes on corporation property. It does not contain the "as near as may be" clause found in Section 2, Article 11, of the South Dakota Constitution.

The act involved in the Tennessee case cited by plaintiff, was an act regulating the taxation of railroads and it seems to have provided for the apportionment of the tax according to the mileage of the railroads in the different taxing districts. In that case the court said:

> "What the value of this property is by this process we are not able to say, but we certainly know it is not the rule of taxation fixed for all other like property in the state, and we know of no constitutional principle on which railroad property of this character can be valued by a different rule than that of other citizens."

The court then goes on to illustrate how a railroad company might have but six miles of line in the city of Memphis, worth perhaps $5000.00 per mile, or $30,000.00, while as a matter of fact, it might have depots, warehouses, office buildings and other property in the city of the value of $500,000.00, and yet, under the act there in question, the city or taxing district would only be able to impose a tax on the mileage, the value of which would not exceed $30,000.00. That case was the City of Chatanooga vs. the Railroad Company. 7 B. J. Lea, 561. We hardly think that case can be considered as in any way parallel with the case at bar, because of the striking difference between the Tennessee Constitution and the Constitution of South Dakota, and between the cases in question. The striking difference between the two constitutions is this: the Tennessee constitution prohibits the assessing and levying of taxes on the property of corporations by a different rule than that of other citizens, while the South Dakota constitution clearly authorizes the adoption of a different rule. By the Tennessee act the tax was apportioned on the mileage basis, while under the South Dakota act the tax, in as far as it affects express companies, is not apportioned on the mileage basis, and furthermore, the act expressly conferred upon the state board of assessment and equalization, the power to apportion and adjust the tax between the several taxing districts, while the Tennessee act contained no such provision. So when the court in the Tennessee case said, "we know of no constitutional principle on which rail-

road property of this character can be valued by a different rule than that of other citizens," they said what cannot be said by any court when construing the constitution of South Dakota, because as we have said, the constitution of South Dakota expressly provides:

> "That the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property."

In so far as the South Dakota Act provides for the taxation of the property of railroad companies, it has removed every objection that the Supreme Court of Tennessee made to the tax act of that state. By sub-division 3 of Section 2, and by Sections 3, 4, 5, 6 and 7 of the South Dakota Act, the law has carefully provided for a thorough assessment, not only upon the mileage of the railways within the respective counties and municipalities, but for an assessment in each municipality of all side-tracks, warehouses, depots, shops, turntables, round-houses, coal-houses, stock yards and all other buildings and grounds of the railways in each municipality; and Section 4 provides that the state board shall transmit to the Mayor and City Council of each city, and the board of trustees of each incorporated town through or into which any such railroad extends, a statement showing the total assessed valuation fixed by said board upon that part of said railroad property described in Sub-division 3 of Section 2, (being the property above indicated) which is located within the corporate limits of said city or town.

The Act goes on to provide plainly how the county officers and municipal officers shall spread this assessment on their records, and how the taxes to be collected by the county treasurer, and the amount due each city, incorporated town, township, or lesser taxing district be paid over when collected by the county treasurer to such city or town, township or lesser taxing district. From this it will be seen that the illustrations made by the Tennessee Supreme Court are nullified by the provisions of the South Dakota law.

The plaintiff's assumption, made obviously for the purpose of argument, that the provisions of the South Dakota Act are somewhat ambigiuous, is wholly without foundation. The law is clear as a bell. When it comes to the tax imposed upon the property of express companies, it very wisely omitted the provisions for the collection and distribution of the tax by the local county or municipal officers, for the very good reason that such a plan of assessment and collection of the tax on the property of express companies, would have

been extremely impracticable, if not dangerous, because as is well known to all, the tangible property of express companies does not consist of road beds, depots, stock yards, roundhouses and other fixed properties such as is used by railways; but on the other hand, the tangible property, of express companies is well known to be fugitive property, such as horses, wagons, pony safes and pouches, money and other fleeting and easily transportable chattels. For these reasons, no doubt, the legislature in the exercise of a wise discretion, not prohibited by the constitution, saw fit to provide for the collection of the tax against the express companies' property by the state treasurer, and conferred upon the state board of assessment and equalization, the power and authority to apportion the amount of taxes thus received, between the state and the various counties in which such companies do business.

There is no discrimination between express and sleeping car companies. All are treated alike. The law has not attempted to distinguish between foreign express and sleeping car companies and domestic companies of the same class.

While it is true that the method provided for the assessment and taxation of the property of express and sleeping car companies is somewhat different from that provided for the property of railway companies, this difference is amply justified by the fact that the property of express and sleeping car companies is so well known to be fugitive in its character, while the property of railway companies on the whole, is not, but is permanent.

Touching the plaintiff's contention that the manner of the imposition of the tax in question upon their property is in substance and effect, a burden upon interstate commerce because of the fact that their income in part at least, was considered as a measure of value in the imposition of the tax, and that this measure of value so used, embraced earnings that were in part interstate as well as intrastate, we desire to call the court's attention, in addition to the cases already cited, to some expressions of this court in the case of Baltic Mining Company vs. Commonwealth of Massachusetts, published in the United States Supreme Court Advance Opinions for December 1, 1913, beginning at page 17. The case involved the constitutionality of an act passed by the legislature of Massachusetts in the nature of an excise tax. Among other things Mr. Justice Day, who delivered the opinion of the court, said:

> "The specific objections of the plaintiffs in error to the imposition of this tax under the facts shown, in the records are threefold: First, the tax is a regulation of interstate commerce, in that it imposes a direct burden

upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the commonwealth of Massachusetts; and third, the tax denies to the plaintiffs in error the equal protection of the law.

"It is well settled and requires no review of the decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the Federal Constitution, and that the states may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control, and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the state by the Constitution may consist of efforts to tax the carrying on of such commerce, and of attempted levies of taxes upon the receipts of interstate commerce as such. (Citing cases.)

"While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. United States Exp. Co. vs. Minnesota, 223 U. S. 335, 344, 56 L. Ed. 459, 464, 32 Sup. Ct. Rep. 211. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part, at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a *mere measure of a tax* of lawful authority within the state, has been sustained. (Citing cases.)"

After reviewing the cases down to and including the late case of United States Express Co. vs. Minnesota, and discussing the effect upon interstate commerce of a tax imposed by way of a percentage upon the capital stock of the corporations in question, Justice Day said:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdic-

tion, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a *measure of taxation*, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

142 U. S. 339. 35 Law Ed. 1035.

Siebert Case—Missouri.

In that case the Court, by Justice Lamar, held:

"1. The Fourteenth Amendment of the United States Constitution does not prevent a state from adjusting its system of taxation in all proper and reasonable ways, nor the classification of property for taxation, nor prohibit special legislation.

2. The Missouri Act imposing a tax upon the business of express companies is not repugnant to the fourteenth amendment of the United States Constitution, because it does not impose a like tax upon railroal or steamboat companies which carry express matter; nor does such Act violate the provision of the constitution of Missouri relating to equality of taxation."

Justice Lamar, speaking for the Court, said:

"On the other hand, express companies, such as are defined by this Act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this Act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definite legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made as between express companies defined by this Act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character, and means of doing business justify the discrimination in this respect which the Legislature has seen fit to impose."

THE KENTUCKY CASE.

In Texas Pacific Railway Company vs. Kentucky, 115 U. S. 339, 29 L. Ed. 414, this Court sustained the Kentucky Tax Act relating to the property of railway companies on the ground that under the Constitution of Kentucky there was

nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods.

In that state the property of railway companies was assessed by the Board of Railway Commissioners, and it was contended by the Railway Company that under such a system their property might be taxed to death through the prejudice or caprice of such board. In reply to that contention the Court, among other things, said:

> "It is still urged, however, that there is, notwithstanding, what has been said, no security that the final action of the Board of Railroad Commissioners, in valuing and assessing railroad property under this statute, may not be unequal, unjust and oppressive; and that either by error or judgment, through caprice, prejudice, or even from an intention to oppress, valuations may be made which are excessive, bearing no reasonable relation to what is fair and just, and fixed arbitrarily, based neither upon actual evidence nor an honest estimate. But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections."

ABSOLUTE EQUALITY UNATTAINABLE.

In a note to the case of Bacon vs. Board of State Tax Commissioners, 60 Lawyers' Reports Annotated, at page 324, under the above heading, we find the following:

> "The doctrine that perfect equality of taxation is in practice beyond the reach of human endeavor has been subscribed to generally by the Federal and state courts throughout the United States. The Supreme Court of the United States has frequently expressed such a view. Absolute equality in taxation, it declared in one case, can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, maufacturing associations, telegraph companies, and each one of the numerous other

agencies of business which the inventions of the age are constantly bringing into existence require different machinery for the purpose of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different kinds of property are adopted. The courts permit this. Tappan vs. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189.

"Perfect equality and perfect uniformity of taxation, as regards individuals or corporations or the different classes of property subject to taxation it declared in another case, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects, which it necessarily embraces, be imperfect. And when we come to its application to the property of all citizens, and of those who are not citizens in all the localities of a large state, the application being made by men whose judgment and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence upon which human judgment is founded. State Railroad Tax Cases, 92 U. S. 601, sub. nom. Taylor vs. Secor, 23 L. Ed. 669.

"The better part of this statement is quoted with approval by Chancellor Runyon of the New Jersey Court of Errors and Appeals in a similar case decided in that state. State Board vs. Central R. Co. 48 N. J. L. 146, 4 Atl. 578.

"Perfect uniformity and perfect equality of taxation in all the aspects in which the human mind can view it is a baseless dream, as this court has said more than once.' Head Money Cases, 112 U. S. 580, Sub. nom. Edye vs. Robertson, 28 L. Ed. 798, 5 Sup. Ct. Rep. 247.

"This court, said Lamar, J., in still another case, has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed, and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property irrespective of its nature or condition or class will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of prop-

erty to its burdens. Pacific Exp. Co. vs. Selbertt, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250."

"Exact uniformity," said the Pennsylvania Supreme Court, "is theoretically possible, but it is practically unattainable by any system of classification yet devised in this state. Com. vs. National Oil Co. 157 Pa. 516, 27 Atl. 374."

IS THIS AN EQUITY CASE IN ANY EVENT?

Counsel desires to say to the court that we do not concede this to be a case where injunction can lawfully issue in any event. While the section of the United States heretofore cited, may possibly be construed to apply only to federal taxes and federal courts, ought it not to be interpreted as a limitation upon the power of federal courts to restrain the assessment or collection of any tax? The same reason obtains whether the tax is state or federal. There is the same necessity for the rule in the one case as in the other. Under that section, as well as upon sound public policy, payment of the tax should be made and redress sought subsequently.

It is true that there have been many cases, some of which are cited in this brief, where the validity of the state tax has been adjudicated in the federal courts in injunctional actions, but we think it was in cases where no objection was made to the adjudication of the questions involved in that form of action, or where injunction was issued, as in the case of Fargo vs. Hart, the injunction simply prevented the state auditor from certifying the amount of the tax down to the respective county officers whose duty would have been under the law to have collected the tax due in their respective counties, and in that case no objection was made to the bringing of the action in that form, and we believe the same was true in the other cases cited in this brief.

It will be recalled that in the Hart case the evidence was held by Justice Holmes and the majority of the Court to be that according to the testimony of the state auditor the board of assessment did in fact, assess tangible personal property of the company, that was shown to have been at the time, outside of the state, and it further appeared that if the state auditor could not be restrained from certifying the taxes down to the respective counties, that a multiplicity of actions would follow for the reason that each county collected its share of the taxes.

Fargo vs. Hart, is, therefore, not authority for the bringing of the present cases, either upon the merits or as a matter of principles for there could be no multiplicity of actions

growing out of the collection of the South Dakota tax because the state treasurer collects the whole tax and divides the money among the counties.

> "Neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity."
>
> State Railway Cases, 92 U. S. 575.
> Dows vs. Chicago, 11 Wall. 108.
> Haunwenkle vs. George Towne, 15 Wall. 548.
> Tennessee vs. Sneed, 96 U. S. 69.
> Cooley on Taxes, Second Ed. 760 to 772.

In Dows vs. Chicago, the Court laid down the rule as follows:

> "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed and who has no adequate remedy from the ordinary process of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of the complainant before the aid of the court of equity can be invoked."

As was said by Judge Amidon in Union Pacific vs. Commissioners, 22 Fed.: 641

> "We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not a ground of equitable jurisdiction."

In these cases there could be no multiplicity of actions, because, as we have said, the state treasurer collects the tax and the action would be against him alone. There could be no cloud upon the title to real estate, because under the South Dakota statute, the real estate of the plaintiffs, if they had any, could not be touched by the state treasurer or sold for the taxes due from the company. In other words, this tax is not a cloud upon the plaintiff's real estate and it cannot be made one. The statute of South Dakota does not authorize the state treasurer to take any proceeding against real estate. He cannot *destrain real estate;* there is no such thing known to the law as the destraint of real estate. Section 22 of the Laws of 1907 only permits the state treasurer to proceed by destraint and sale, which sale shall take place at some point in the state. Wells, Fargo & Company had no real estate in South Dakota.

There was no evidence offered to indicate that the collection of this tax would work an irreparable injury upon the plaintiff. The contention of the plaintiff that the collection of a few thousand dollars' taxes from a company which the record shows to be worth many millions of dollars, with a credit of many millions more, would result in irreparable injury unless restrained, or even stop or check them in their business, borders upon the unbelievable, and amounts almost to a reflection upon the intelligence of the Court.

It is suggested that had the trial court reached the conclusion that the tax was illegal, it would still have been the duty of the Court, under the rule in Dows vs. Chicago, to dismiss the bills of complaint for want of jurisdiction and equity and refer the complainants to their remedy at law, because no sufficient grounds had been shown to justify the writ of injunction.

The state must have its taxes or it cannot live, and where the validity of a tax is questioned the party resisting the payment of the tax should be required to pay, and even if the state treasurer had collected an unlawful tax, the amount paid could be recovered in an action at law against him and his bondsmen for that purpose. In other words, it is against public policy that a party disputing the validity of a tax claimed to be due to a sovereign power should be permitted to retain the money while he is litigating the question with the state. Be that as it may, the writ of injunction should not issue except where it is clearly and satisfactorily shown that to refuse the writ would result either in a multiplicity of actions, a cloud upon real estate, or an irreparable injury, and it may be said without fear of contradiction in the record that neither of those grounds were shown.

While fraud, accident or mistake are in a general way grounds for the exercise of equity jurisdiction, they are not necessarily grounds for enjoining the collection of a state or county tax by a federal court.

Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481, 57 L. Ed. 1289.

While this Court has often held that the remedy at law must be plain, speedy and adequate in order to preclude equitable jurisdiction, those decisions arose out of the ordinary transactions of life between individuals or companies. This rule, which has become text book law, was not founded on the decisions of this Court in cases where federal courts were called upon to interfere by way of injunction with the fiscal operations of the state governments. It is believed the spirit of the decisions of this court has been to draw a distinction, amounting to an exception, in the application of this

flat rule, between cases arising out of the ordinary transactions of life, and cases like this, where the remedy asked for results in temporarily depriving a local government of its revenues, which is its life blood. Such an exception should exist. Every person owes a duty and is under obligations to the governments which protect him, that he does not owe to his fellow men. His rights to some extent must give way to the needs of the state. Should not the plaintiff in a case like this be required to show that had it paid the taxes claimed to be due by the state treasurer, there was no legal method whereby it could have preserved its federal legal rights unimpaired, even though those rights might not be so speedily or conveniently preserved by action at law against the state treasurer and his bondsmen?

It must be conceded that if the tax was illegal from any cause and was collected by the state treasurer over the protest of the plaintiff, or paid to prevent a seizure, he would have been liable in an action at law to restore the money, or for the value of the property taken.

97 U. S. 181.

The spirit of the rule of this Court was again reflected in Singer Machine Co. vs. Benedict, when the Court, by Mr. Justice Van Devanter, said:

> "The decisions of the state courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty, interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."

It is true that South Dakota has no such statute as Section 5750, Revised Statutes of Colorado. But that section merely conferred another right of action supplemented to the existing right of action at law which the taxpayer had against the officers who collected an illegal tax over his protest. On the other hand, by the law of South Dakota, no tax can be collected against the plaintiff by a multiplicity of county, city or district officers, but it is collected by the state treasurer alone, who is always under ample bond to protect all concerned against his wrongful acts.

It is conceded that had the proofs shown or indicated that the refusal of the Court to issue the writ of injunction would have resulted, either in a multiplicity of action, or irreparable injury, or a cloud upon real estate, then the writ of injunction could properly issue if the Court further found that the tax was illegal. But, in the absence of all of these elements, it is not within the rights of a Federal court to enjoin the collection of a tax claimed to be due by the officer of a state. This is the rule as stated in Dows vs. Chicago.

THE FAIRNESS OF THE TAX.

Plaintiff makes the contention that on the merits the assessment and tax imposed was unfair and in violation of reason, justice and common sense, and should convict the assessment of such lack of the element of judgment as to require interference by the judicial power to correct it. Without supposing that this Court would assume to review the determination of the board of assessment of any question of fact, under the decisions of this Court, we have to say that there is no justification for such criticism.

Who can say on the merits that this is an unfair tax, when we come to consider the benefits received by the plaintiff from the state? If a train is held up, or a safe is robbed, or an agent defaults, or a fire occurs, or a flood endangers, or a car is wrecked, or a strike obstructs the traffic, the whole police forces of the state are thrown into the breach. The state's officers and courts, the sheriffs, police forces, and even its militia, are freely used to safeguard and protect the agents, employees, property rights and business of plaintiff, and it has its property and offices and agents in almost every county in the state. Yet it would have its property in this state so assessed as to make their annual tax to the state about three hundred dollars, for that is what it would amount to if the assessment for which they contend should obtain. The injustice of this speaks for itself. The plant of plaintiff as a going concern in South Dakota is worth all and more than it was assessed.

Mr. Justice Brewer, in the final opinion of the Court on rehearing in the Adams Express Co. vs. Ohio Auditor, 166 U. S. 224, said:

> "Its tangible property and its business is scattered throughout many states, all whose powers are invoked to protect its property from trespass and secure it in the peaceful transactions of its widely dispersed business, yet because that tangible property is only $4,000,000, we are told that that is the limit of the taxing power of these states. In other words, it asks these states to protect property which to it is of the value of $16,000,000, but is

willing to pay taxes only on the ~~business~~ sales of a valuation of $4,000,000. The injustice of this speaks for itself."

In the same case, in 165 U. S., at page 222, Mr. Chief Justice Fuller used the following expression while discussing this question of the fairness of the tax imposed in the Ohio case in answer to the argument that the state could only assess the fugitive property of the express company:

> "Considered as distinct subjects of taxation, a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,340.00 worth of horses, wagons, safes and pouches produce $275,467.00 in a single year? Or $28,438.00 worth produce $358,519.00? The answer is obvious."

It is contended that the decree of the Court of Appeals reversing the decree of the District Court for the District of South Dakota should be reversed.

Respectfully submitted,
ROYAL C. JOHNSON,
Attorney General, and
L. T. BOUCHER,
Solicitors for Appellant.

C. C. CALDWELL and
M. H. O'BRIEN,
Of Counsel for Appellant.

APPENDIX.

Sections of the South Dakota Constitution in force in 1910:

SECTION 17, ARTICLE 6.

"No tax or duty shall be imposed without the consent of the people or their representatives in the legislature, and all taxation shall be equal and uniform."

SECTIONS 2 AND 3, ARTICLE 11.

"All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property."

SECTION 3.

"The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."

Section 2 of Article 11 of the South Dakota Constitution, as amended in 1912, is as follows:

"All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Franchises and licenses to do business in the state, gross earnings and net income, shall be considered in taxing corporations, and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be by the same methods as are provided for assessing and levying the taxes on individual property."

Chapter 64 of the Laws of South Dakota, 1907, as amended by chapter 162 of the Laws of 1909, is as follows:

CHAPTER 64.

RELATING TO THE ASSESSMENT AND TAXATION OF CORPORATION PROPERTY.

An Act Providing for the Assessment and Taxation of the Property of Railway, Telegraph, Telephone, Express and Sleeping Car Companies.

Be It Enacted by the Legislature of the State of South Dakota:

§ 1. Property Assessed by State Board of Assessment and Equalization.) All property, real and personal, belonging to any railroad company in this state, and necessarily used in the operation of its line or lines of railway in this state, shall be assessed for the purposes of taxation by the state board of assessment and equalization, and not otherwise; and in making said assessment the said board shall, among other things, take into consideration the value to said railway company of its franchises, rights and privileges granted under the laws of this state, to do business as a common carrier in this state; and for the purpose of aiding said state board of assessment in making said assessment, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each

railway company in this state and to make an estimate of said value and to make and file with the state auditor on or before the first day of June each year a written and detailed report of such information, facts and estimate. In said report the board of railway commissioners shall make a separate estimate of the value of that part of the railroad property, including terminals, depots, warehouse lots, sidings, passing tracks, switches, roundhouses, shops, yards, grounds and other structures which are situated within the limits of an incorporated city or town. Nothing in this act shall be so construed as to prevent the local assessment and taxation of all property of such railway company, both real and personal, as is not actually and necessarily used in the operation and maintenance of its lines of railway.

§ 2. Statement by Officer Must Be Filed with Board.) It shall be the duty of the president, secretary, or other accounting officer thereto duly authorized, of any railroad company owning, leasing or operating any railroad within this state, to furnish the state board of assessment and equalization on or before the first day of June of each year, a statement signed and sworn to by such officers, embracing and showing for the year ending April 30th preceding:

First. The whole number of miles of main line or lines and branches thereof owned, operated or leased in the state by the railroad company making the return, and the value thereof per mile.

Second. The number of miles of main line or lines and branches thereof owned, operated or leased by such company and the number of miles of side track and the value thereof per mile, the quantity of lands used for gravel or sand beds or for snow protection, and the number and character of buildings and value thereof and width of right of way and width and length of warehouse lots, located in each county in the state.

Third. The number of miles of main line, and the number of miles of side tracks and passing tracks and value thereof, the width and length of right of way, the number and size of warehouse lots upon or contiguous to the right of way, the size, cost and character of the passenger depot, freight depot, warehouse or warehouses, shops, turntables, roundhouses, engine stables, coal houses, stock yards and of all other buildings, the amount of ground used for yards in addition to ground already specified, and the quantity of unplatted land held or used exclusively for railway purposes, owned by said company and

situated within the incorporated limits of each city or town, and the value thereof, and of any terminals therein owned by said company.

Fourth. The number of engines, passenger, mail, express, baggage, freight and other cars owned by said company and used in operating such railroad in this state; and on roads having various lines and branches within the state, the statement shall show the actual amount of rolling stock owned by said company, in use on each of said lines and branches within this state during the year for which the report is made.

Fifth. The total gross earnings of the company for the year for which the report is made, the amount paid out for operating expenses, for taxes, for interest on bonds, and for permanent improvements.

Sixth. The total net earnings of the company for the year for which the report is made, and the total number of miles owned and operated.

Seventh. The total gross earnings of the various lines and branches owned and operated by said company within this state during the year for which the report is made, the amount paid out of the same for operating expenses incurred in operating such lines and branches, the total amount paid out for taxes upon said property within the state, the amount paid out for interest on bonds issued upon the lines and branches in the state, the amount of such bonds per mile and the interest which they bear, and the amount paid out for permanent improvements upon the lines and branches within the state during said year.

Eighth. The percentum paid to the stockholders of said company during said year as dividends, upon both common and preferred stock, and the surplus representing undivided profits on hand at the time of making said statement.

Sec. 3. Valuation and Assessment—When Made.) The valuation and assessment of the property of railroads by the said board of assessment and equalization shall be made as of the first day of May and shall be in the same ratio as that of the property of individuals, and such assessment shall be made upon the main line or lines, and branches thereof within the state separately, and shall include the right of way, road bed, bridges, culverts, rolling stock, depots, yards, shops, buildings, gravel or sand beds, lands for snow protection, and all other property, real and personal, used in and employed about and incidental to the operation and maintenance of such rail-

roads and branches thereof. In assessing a railroad and its equipment and property, the said state board of assessment and equalization shall consider the earning power of the property as shown by its gross and net earnings, the value of the franchise or other privileges granted by the state under which it has the right of eminent domain and the right to do business within the state, and any and all other matters necessary to enable them to make a just and equitable assessment of the value of such property per mile in each county through which said railroad passes. Said board shall determine and fix separately the aggregate value of the property described in subdivision three of section two of this act, which is located within the corporate limits of any city or town.

§ 4. Board to Transmit Statement to County Commissioners.) The state board of assessment and equalization shall transmit to the board of county commissioners of each county, through which any such railroad runs, a statement showing the length of main track, of main line or lines, and the branches thereof within such county not located within the corporate limits of any city or town, and the assessed value per mile of said main line or lines, and branches as fixed by a pro rata distribution per mile of the assessed value of the whole property, except that part located within the corporate limits of cities or towns, as aforesaid, and said statement shall be entered upon the proper records of said several counties. Said board shall also transmit to the mayor and city council of each city and the board of trustees of each incorporated town through or into which any such railroad extends, a statement showing the total assessed valuation fixed by said board upon that part of said railroad property described in subdivision three of section two of this act which is located within the corporate limits of such city or town, and said statement shall be entered upon the proper records of said city or town and a transcript thereof transmitted to the county auditor of the county in which such city or town is located, to be by him listed for taxation the same as other property within such city or town assessed by the assessor thereof.

§ 5. Duty of County Commissioners.) It shall be the duty of the board of county commissioners of all counties receiving such statements from the state board of assessment and equalization, at their first meeting after receiving such statement, to make and enter in the proper records, an order stating and declaring the length of the main track of road and branches and assessed value of

such road and branches lying within each township, and lesser taxing district in their counties respectively, through or into which said road or branches thereof run, as fixed by the rate of assessment per mile as made by the state board of assessment and equalization, and when received, shall also enter in the proper records the assessments made by said board of the railroad property in such county located within the limits of each city or town transmitted to the mayor and city council or board of trustees thereof, and the amounts so entered of record shall constitute the taxable value of said property for all taxable purposes, and shall transmit a copy of such orders and records to the city council or trustees of each city or incorporated town or township and the proper officer of each lesser taxing district, and also to said railway company.

§ 6. Rules of Taxes.) All such railroad property so assessed by said state board of assessment and equalization shall be taxable upon said assessment at the same rates and for the same purposes as the property of individuals within such counties, cities, incorporated towns, townships and lesser taxing districts. The proper officer of each taxing district shall certify to the county auditor the several rates of taxes to be levied in said district, and the said county auditor shall extend the taxes against said assessment in a book to be called the "Railroad Tax Book," and shall transmit a copy of the rates so extended to each railroad company.

§ 7. Duty of County Auditor.) The county auditor shall make and deliver a duplicate of said railroad tax book to the county treasurer and the county treasurer shall be charged with the collection of said railroad taxes in the same manner and under the same provisions and restrictions that are imposed upon such treasurer in the collection of the taxes of individuals; and the amount due each city, incorporated town, township or lesser taxing district shall be paid over when collected by the county treasurer to such city, or town, township or lesser taxing district.

§ 8. Delinquent Taxes.) All laws in force relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this act, and whenever any taxes levied under the provisions of this act shall become delinquent, the county treasurer having control of such delinquent taxes shall proceed to collect the same in the same manner and with the same right and power as a sheriff under execution,

except that no process shall be necessary to authorize him to sell engines, cars or any other rolling stock for collection of said taxes.

§ 9. Company Must File Map with County Auditor.) Every railroad company shall file with the county auditor of each county through or into which its line or lines of railroad run, a map, showing the right of way, depot grounds, yard room, gravel or sand beds, and land for snow protection, and lands otherwise used by it in the maintenance and operation of its railway at the date of filing such map, showing lots or parts of lots and blocks in cities and towns and the number of acres in each government subdivision, and it shall be the duty of the county auditor to provide for the exception from assessment by the local assessor all such right of way, depot grounds, yard room, gravel or sand beds and lands for snow protection, or lands otherwise used in the operation and maintenance of its railway. It shall be the duty of the county register of deeds to notify the county auditor of any deed to any railway company for the right of way, depot grounds, yard room, gravel or sand beds, or lands for snow protection, that may be filed in his office for record so that the same may be entered by such county auditor on said map for the purpose above mentioned.

§ 10. Failure to Comply.—Duty of Board of Railway Commissioners.) In case the proper officer of any railroad company shall fail to make the statement under oath herein named, the state board of assessment and equalization shall add twenty-five per cent to the assessable value of the property of such company.

For the purpose of collecting the information and facts, and to enable them to arrive at a correct estimate of the value of railroad property in this state for their own use in making maximum passenger and freight schedules, and for the use of the state board of assessment and equalization in assessing the value of said property for purposes of taxation, the board of railway commissioners are hereby authorized to employ a competent expert to assist them in making such investigation.

§ 11. Statement Must Be Furnished to State Auditor.) It shall be the duty of the president, secretary, general manager or superintendent of every telegraph or telephone company doing business in this state, to furnish to the state auditor on the first day of July of each year, a statement under oath in such form as the auditor may prescribe showing the following facts:

First. The total number of miles owned, operated, or

leased within the state by such company, together with the number of separate wires thereon, the kind of metal used for such wires, the kind and dimensions of the poles used (and the distance the same are set apart from each other), the average cost of building and equipping said line per mile, and stating the counties through or into which the same extend, or in which such company does business.

Second. The number of miles in each county and the number of stations and exchanges belonging to the company and location therein, together with the number of telegraph or telephone instruments used in such county.

Third. The average number of poles per mile used in constructing said lines; and a telephone company shall also give the number and names of cities and towns in which such company maintains local telephone exchanges, under an ordinance granted by a city or town, and the value of the entire plant, including all wires, poles, instruments, office furniture and apparatus, franchises and equipment considered as one property in operation.

Fourth. The number of offices maintained by the company in this state and the total gross and net receipts of all said offices for the year ending April 30th, preceding the making of said statement; the amount paid out for operating expenses, for taxes, for interest on bonds and for permanent improvements.

Fifth. The per centum paid to stockholders of said company during said year as dividends upon both common and preferred stock and the surplus on hand representing undivided profits at the time of making said statement; the total bonded debt and rate of interest and the total capitalization of the company.

Such statement shall be made according to such forms and instructions as may be prescribed by the state auditor and with reference to lines owned and operated on the first day of May of the year for which the return is made.

§ 12. Railroad Commissioners to Ascertain Value of Telegraph and Telephone Property.) For the purpose of aiding the state board of assessment and equalization in making an assessment of the property of telegraph and telephone companies, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each telegraph and telephone company in this state, including the value of its franchises, and to make an estimate of the value thereof and to make and file with the state

auditor on or before the first day of July each year a written and detailed report of such facts, information and estimate, and for the purpose of securing facts and information said board is hereby authorized to inspect the books and records and property of said companies and employ an expert when deemed necessary.

§ 13. In Case of Failure to Comply.) In case any telegraph or telephone company refuses to make the statement herein required under oath and at the time specified, the state board of assessment and equalization shall add twenty-five per cent to the assessable value of the property of such company. The board of assessment and equalization shall consider all the statements, facts, information and estimates filed as aforesaid, and any other information obtainable concerning the value of the property of said companies and may add any property omitted therefrom, and shall proceed to assess said property and determine its value, including the value of its franchises, which shall be made as of the first day of May and shall be in the same ratio as that of the property of individuals.

§ 14. Board to Make Tax Levy.) Said board, after assessing the value of said property, shall proceed to levy a tax thereon, which shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied.

Each telegraph or telephone company so assessed shall, on or before the first day of March in each year, pay to the state treasurer the amount of tax so levied on its property, which shall be in lieu of all other taxes. If any telegraph or telephone company shall fail to make and file said statement each year as herein provided, or shall file a false statement, it shall forfeit to the state not less than five hundred dollars nor more than five thousand dollars, to be recovered in the name of the state in any court of competent jurisdiction.

The state board of assessment and equalization shall cause a statement to be transmitted to the county auditor of each county in which any lines or office or other property of any telegraph or telephone company is situated showing the amount or proportion of such property and value thereof situated in such county, and also showing the amount or proportion of such property and the value thereof situated within the corporate limits of any city or town in said county, and the state treasurer shall remit to the treasurer of each such counties their pro-

tionate share of such tax and the said county treasurer shall turn over to each city or town the amount of said tax due such city or town as shown by the statement of the state board of assessment and equalization and shall apportion and distribute the remainder of said fund among the various county school, road and other local tax funds pro rata according to the levy for such purposes made in the preceding year.

§ 15. Time of Assessing Railroad Property.) The state board of assessment and equalization shall assess all property of said railroad companies in the manner aforesaid on the 3rd Monday in July of each year, and all the property of telegraph and telephone companies in the manner aforesaid on the 4th Monday of July each year.

§ 16. Express and Sleeping Car Companies—Statement of.) Every express company and every sleeping car company doing business in this state must transmit to the auditor of the state a statement of its business done within this state for the year ending on the thirteenth day of April preceding, which statement must be furnished on or before the first day of July of each year and shall contain the following items:

First. The total number of employes engaged by such company within the state, and the number thereof in each county.

Second. The total number of offices maintained by it within the state, and the number thereof in each county; the value of all office furniture, fixtures and real estate owned by it within this state.

Third. The number of miles of railroad over which such express or sleeping car company conducts its business within the state, and the number of miles thereof in each county.

Fourth. The total number of express cars or sleeping coaches owned by such company, and used within the state, and the number of such express or sleeping cars leased and controlled, but not owned by such company, and used within this state, or operated under lease or contract in any manner.

Fifth. The gross earnings of the total business of such company transacted within this state for the year ending April 30th preceding, and the value of all property of such company used in this state.

§ 17. Property of Express and Sleeping Car Companies—When. Assessed.) If the statement aforesaid shall not be received by the said auditor by the first day

of August of each year, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for the purpose of aiding the state board of assessment and equalization in assessing the value of the property of such companies, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each express and sleeping car company in this state and to make an estimate of said value and to make and file with the state auditor on or before the first day of July of each year a written and detailed report of such information, facts and estimate.

The state board of assessment and equalization shall, on the first Monday of July each year, assess all the property of every express and sleeping car company doing business in this state and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state for the year ending on the thirteenth day of April preceding the statements made by said companies and by the board of railway commissioners and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals. All the statements aforesaid and information received shall be laid before the board of assessment and equalization, which board shall review said statement or information and may change the valuation given or add to said statement any property omitted therefrom, and said board shall levy a tax upon said property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied.

§ 18. Form of Statement.) The statement of said companies required by this act shall be made according to such forms and instructions as may be prescribed by the state auditor and with reference to property owned on the first day of May of the year for which the return is made. If any express or sleeping car company aforesaid shall fail to make said statement, it shall forfeit to the state not less than five hundred dollars nor more than five thousand dollars, to be recovered in the name of the state in any court of competent jurisdiction.

§ 19. Taxes—When Paid.) Each express and sleeping car company so assessed shall on or before the first

day of March of each year, pay to the state treasurer the amount of tax levied on its property for the year preceding, which shall be in lieu of all other taxes.

§ 20. Apportionment of Taxes.) The state treasurer shall apportion the amount of taxes received under the provisions of this act between the state and the various counties in which such company is doing business, as herein provided.

The amount to which each is entitled shall be determined by the state board of assessment and equalization, and the county treasurer shall distribute the portion received by his county to the various county and local funds according to the levies made upon other property for the preceding year.

§ 21. In case any telegraph, express, telephone and sleeping car companies doing business in this state shall fail or neglect to pay the tax due from it to the state for a period of thirty days after the same shall have become due, there shall be added to such tax a penalty of twelve per cent per annum.

§ 22. Property May Be Distrained.) At any time after the expiration of thirty days from the time any such tax has become due and payable, the state treasurer shall distrain sufficient property of the delinquent to pay the same together with said penalty and the cost of distraint and sale, and shall immediately advertise the sale of the same in at least three newspapers published in the state, stating the time when and place where such property shall be sold, and four weeks' notice of the time and place of such sale shall be given.

Such sale shall take place at some point in this state, and the proceeds thereof shall be applied to the payment of such tax, penalty and cost.

§ 23. Notice.) The state board of assessment and equalization shall give at least ten days' notice of the time and place of its meeting, provided for in this article, to the officer of any railroad, telegraph or telephone company or other corporation making a return of the property of their company to the said board for the purpose of assessment and taxation, of every increase made by said board on the valuation of any of the property returned as aforesaid, for the purposes aforesaid, or of any addition made to said returns, and said companies shall have the right to appear and be heard, before said board, in all matters relating to the assessment of the property of said company.

§ 24. Repeal.) All acts and parts of acts in conflict with this act are hereby repealed.

Sec. 25. Emergency.) There being serious defects in the assessment laws in relation to the assessment of the property of railway, telegraph, telephone, express and sleeping car companies, an emergency is hereby declared to exist and this act shall be in force from and after its passage and approval.

Approved March 7, 1907."

THE SOUTH DAKOTA DECISION.

CORSON, J. This is an original proceeding on writ of certiorari granted by this court, and directed to the state board of assessment and equalization of this state, commanding said board to certify to this court for review the proceedings of said board in assessing the property of relator for the purposes of taxation for the year 1891. From the affidavit made on behalf of the relator, it appears that the relator is a joint-stock association created, organized, and existing under and by virtue of the laws of the state of New York, and is an express company doing business in the state of South Dakota, with agencies and places of business therein, as a common carrier of goods, freight, merchandise, and money for hire; that prior to the 1st day of July, 1891, the relator made and transmitted to the state auditor the statement required by section 65, c. 14, Laws 1891, from which it appears that the value of the real and personal property of relator in this state was $8,956.80, and that said value was by said board fixed at the sum of $35,000, upon which sum a tax was levied for said year; that the value placed upon said property by said relator was its true value and that the value placed on said property by said board was excessive, unjust, and inequitable, and not in the same ratio as the assessment upon the property of individuals within said state; and that in raising the value of said property to the amount stated the said board exceeded its jurisdiction, and failed to regularly pursue the authority vested in said board. To the writ issued the state board of assessment and equalization made return of its proceedings as such board pertaining to the valuation and assessment of the property of said relator. By such return it appears that the statement required to be made by the relator was made and transmitted to the state auditor; that on August 5, 1891, Mr. Naylor appeared before the board on behalf of the relator in regard to the assessment of the American Express Company, and that on August 10th, on motion of Mr. Taylor, one of the members of the state board of assessment and equalization, the American Express Company was assessed at $35,000. In

addition to return made by the state board, the attorney general and the counsel for relator made a stipulation as to certain facts, the material part of which is as follows:

"That said board of assessment and equalization, in determining the valuation to be placed upon the property of said American Express Company, took into consideration such contracts of the said American Express Company with said railway lines, and that said board, in arriving at the valuation of said express company's property within said state, took into consideration the gross earnings of said express company under and by virtue of said contracts; and that no further or other testimony or evidence relative to the value of the property of said express company was submitted to or had before said board at its said session than the statement filed with the state auditor pursuant to the provisions of section 65, c. 14, of the General Laws of South Dakota for the year 1891, and the statement before said board of said express company's probable net earnings in South Dakota made by its agent.'"

A state board of assessment and equalization is provided for by section 45, c. 14, Laws 1891, which is as follows:

"The governor, auditor, secretary of state, state treasurer, and attorney general of the state shall constitute the state board of assessment and equalization. Said board of equalization shall hold a session at the seat of government commencing on the first Monday of August of each year. A majority of the members of said board shall constitute a quorum, and have authority to act."

The manner of valuing and assessing the property of express and sleeping car companies is provided for by sections 65 and 66, which are as follows:

"'Every express company and every sleeping car company doing business in this state must transmit to the auditor of the state a statement of its business done within this state for the year ending on the thirtieth day of April preceding, which statement must be furnished on or before the first day of July of each year, and shall contain the following items: First. The total number of employes engaged by such company within the state, and the number thereof in each county. Second. The total number of offices maintained by it within the state and the number thereof in each county; the value of all office furniture, fixtures, and real estate owned by it within this state. Third. The number of miles of railroad over which such express or sleeping car company conducts its business within the state and the number of miles thereof in each county. Fourth. The total number of express cars or sleeping coaches owned by such company and used within the

state, and the number of such express or sleeping cars leased and controlled, but not owned by such company, and used within this state or operated under lease or contract in any manner. Fifth. The gross earnings of the total business of such company transacted within this state for the year ending April 30th preceding, and the value of all the property of such company used in this state. Section 66. If the statement aforesaid shall not be received by the said auditor by the first day of August of each year, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly. Said property shall be assessed by the state board of assessment and equalization, and not otherwise. Said board shall value and assess said property as of the first day of May of said year, and in assessing said property shall take into consideration the gross earnings of said company within the state for the year ending on the 30th day of April, preceding, and any and all other matters necessary to enable them to make a just and equitable assessment of said property, in the same ratio as the property of individuals. The statements so filed or the information so obtained shall be laid before the state board of assessment and equalization, which board shall review said statement or information, and may change the valuation given or add to said statement any property omitted therefrom, and said board shall levy a tax on said property, which tax shall be equal to the average assessment of state, county, school, and municipal taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied."

By the statement transmitted to the state board by the relator it appears that the relator had 129 express offices, transacted its business over 1,603 miles of railroad, received as gross earnings the sum of $20,480.64, and had property, real and personal, of the value as therein stated of $8,956.80 within this state. The question therefore presented for decision is, did the state board of assessment and equalization exceed its jurisdiction in valuing and assessing the property of relator at $35,000? or did it fail to regularly pursue its authority? It will be observed by an examination of the statute relating to the assessment of express companies that the duties of the state board of assessment and equalization in assessing the property of relator are not those of an equalizing board, but are those of an original assessing board vested with full power to value and assess the property of such company at such sum as they shall deem just and equitable, *and that no power is expressly conferred upon any other board or upon any court to review their assessment.* It will

be further observed that by the provisions of the statute, notwithstanding the relator is required to transmit to the state auditor a statement containing certain facts, among which is "the value of all office furniture, fixtures, and real estate owned by it within the state," no special legal effect is given to such statement. It is true the statement transmitted to the state auditor, or information obtained otherwise, if no statement is transmitted, is required to be laid before the board for review, and from it and all other matters necessary to enable the board to make a just and equitable assessment, including the gross earnings of the relator, it "shall value and assess said property," but the valuation and assessment must be made by the board itself. The learned counsel for the relator does not, as we understand his brief, controvert the fact that the state board of assessment and equalization had jurisdiction over the subject-matter and of the party, and was vested with the power to "value and assess" the property of the relator. But he contends that in the exercise of the power the board did not regularly pursue the authority with which it was clothed, and thereby exceeded its jurisdiction and rendered its assessment void. The learned counsel for the relator contends that the state board of assessment and equalization is a creature of the statute; that its authority for its action and the manner of its procedure are determined and regulated by the statute; and that it is well-settled law that such body must strictly follow and comply with the statutory regulations creating and defining its authority, and any deviation from such statutory regulations is in excess of its jurisdiction, rendering such act void. These propositions are substantially correct, and are not controverted by the learned attorney general. But the learned counsel states another proposition upon which his argument is largely based, to which we cannot assent without a material qualification, and that is "that the power of the court is clear upon the return of the writ, and after an examination of the merits, if an erroneous or excessive assessment has been made, to alter, reduce, or annul the same." The court, under the provisions of our statute governing it in proceedings on certiorari, is not vested with the power to examine the case on "the merits" and if the assessment is found "excessive" to alter, reduce or annul the same. This court is authorized to grant the writ only when inferior courts, officers, boards or tribunals have exceeded their jurisdiction, (section 5507, Comp. Laws); and "the review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board, or officer has regularly pursued the authority of such court, tribunal, board, or officer." Section 5513, Com. Laws. The writ is confined to questions

touching the jurisdiction of the subordinate courts, officers, boards or tribunals, and the regularity of their proceedings. In other words, when such courts, officers, boards or tribunals have jurisdiction of the subject-matter and of the party, their action will be sustained unless in their proceedings they do some act forbidden by law or neglect to do some act required by law; or, as stated by Judge Cooley, "when the assessment is erroneous in point of law, either because the assessors have adopted some inadmissable basis in making it, or because they have disregarded any of the mandatory provisions of the statute on which parties assessed have a right to rely," "certiorari will lie to correct the proceedings, Cooley, Tax'n, p. 758; People vs. Ogdensburgh, 48 N. Y. 390; Owners of Grounds vs. Mayor, 15 Wend. 374."

"It is insisted that the board had no right to take into consideration the contracts of relator with the railroad companies in fixing the value of the property and making its assessment. What provision of the law prohibits the board from taking such contracts into consideration? We have not been able to discover any; but on the other hand, we find that the board is authorized to take into consideration *"any and all matters"* that will enable them to make a just and equitable assessment. The law has placed no limitation upon the board as to the matters they shall take into consideration, and we certainly can impose none. Again, it is contended that the board fixed the value of the relator's property at $35,000, without changing the valuation of such property as transmitted to the state auditor; but when the board was authorized to value and assess the relator's property, its value and assessment is the only one made, and, when made, if the value and assessment exceed that of the value placed upon the property by the relator, it necessarily changes the value placed upon the property by relator, and this change the state board is authorized to make. The counsel for relator also insists that the state board is limited in its powers by the provision in the statute that its assessment must be just and equitable, and in the same ratio as the property of individuals, and that this court possesses the power to keep such board within the limits of the authority conferred. But the law has imposed the duty of determining what is a just and equitable assessment upon the state board of assessment and equalization, and has not conferred upon this court the power to review and revise the judgment of the state board upon that question. This court cannot substitute its own judgment for that of the board of assessment and equalization as to what is the assessable value of relator's property, in these proceedings. By its assessment the board has affirmed that the true value of the

property of relator is $35,000. In fixing its value the board had before it such evidence as the law required, and its decision is binding and conclusive upon this court in this proceeding. Land Co. vs. Gowen, 48 Fed. Rep. 771. But assuming that this court could review the valuation and assessment of the state board of assessment and equalization, and, if it found the assessment excessive, could reduce it, what is there in the record before us that would warrant this court in saying that the value and assessment of relator's property are not just and reasonable, and in the ratio of individual assessments? The counsel's reply to this is that the statement made by the relator and transmitted to the state auditor shows the true value of the property, and that, as the value fixed by the state board greatly exceeds the value so fixed by the relator, it must necessarily be excessive. We think the position is untenable. The value fixed in the statement is, as we have seen, given no legal effect, or made by the law evidence of its value. The value as fixed by the relator may, like other matters before the board, be considered in determining the value of the property, but is given no greater weight than the other matters considered. It is the board that shall "value and assess" the property, and not the express company. Upon the board devolves the duty of taking "into consideration the gross earnings of said company, * * * and any and all other matters necessary to enable it to make a just and equitable assessment of the relator's property." The value and assessment, therefore, made by the state board must, we think, be conclusive, in this proceeding, on this court, and must be regarded as the just and equitable value for the purposes of taxation. If the decision of the state board was not to be final upon the question of value, why was there given to it such extensive powers in the matters it could consider in determining its value and assessing the property? This large discretion as to the matters it could consider in making such assessment would seem to have been given for the purpose of aiding said board in arriving at a just and equitable assessment, and this we must presume the state board has made."

The counsel further contends that the act under which the assessment of the relator was made is broad enough to enable the state board of assessment and equalization to take into consideration the gross earnings of the relator from the contracts which relator had with the various railroad companies, extending to points without the state, and therefore is unconstitutional and an invasion of the right of interstate commerce, which belongs to the jurisdiction of the national and not of the state legislature, and the acts of the board, in so far as it undertakes in any way to tax directly or indirectly

the property of relator, are absolutely void. The learned attorney general insists that the power to tax the property of relator within this state does not interfere with interstate commerce, but is the exercise of a power on the part of the state that it has never surrendered to the federal government, although in fixing its value the state board may have taken into consideration its gross earnings from the contracts referred to. In this contention we agree with the attorney general. The taxing power of the state is one of its attributes of sovereignty, and this power reaches all property within the state which is not denominated means of the general government, and may be exercised *at the discretion of the state.* Whatever exists in the state in the form of property within the limits of the state, real or personal, with the exception stated, is subject to its laws. Nathan vs. Louisiana, 8 How. 73. The tax imposed by the law in controversy, in the case at bar, is not imposed upon its contracts with the railroads, but upon its property, real and personal, within the state. As one of the means of ascertaining the value of such property, its earning power within the state is taken into consideration. We think no case cited by counsel for relator has gone to the extent of holding that the property of persons or corporations used in the business of interstate commerce is not subject to taxation. The supreme court of the United States has held that a ship engaged in foreign commerce is taxable in its home port, where its owners have their domicile. Hays vs. Pacific M. S. Co., 17 How. 596; St. Louis vs. Ferry Co., 11 Wall. 423; Ferry Co. vs. Penn, 114 U. S. 196, 5 Sup. Ct. Rep. 826. It has held railroads liable to taxation within the state, though they extended into other states. State Railroad Tax Cases, 92 U. S. 575; Marye vs. Railroad Co., 127 U. S. 117, 8 Sup. Ct. Rep. 1037. It has held that the capital stock of telegraph companies may be taxed, as well as its tangible property within the state. Telegraph Co. vs. Attorney General, 125 U. S. 530-532, 8 Sup. Ct. Rep. 961. It has also held that the capital stock of sleeping car companies may be taxed by the state through which its sleeping cars pass and repass. Pullman Car Co. vs. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876. And that express companies are subject to taxation on express business transacted within the state. Express Co. vs. Seibert, 12 Sup. Ct. Rep. 250, (decided in January, 1892). In Pullman Palace Car Co. vs. Pennsylvania, supra, Mr. Justice Gray states the distinction between the two classes of cases that apparently conflict. He said: "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to

carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself." The tax in the case at bar was levied upon the property itself, and the gross earnings the board of assessment and equalization was authorized to take into consideration "were the gross earnings of the total business of such company transacted within the state." And by a fair construction the contracts with the railroad companies considered by the board were contracts with railroad companies within the state; but if not so, we do not deem the fact that, in considering any and all matters necessary to enable the state board to make a just and equitable assessment, it considered these contracts material in this case. As before stated, the state board was not limited as to the evidence or matters it should consider in arriving at the valuation. As the state board of assessment and equalization had jurisdiction of the subject-matter and of the party, and has regularly pursued its authority, its action, so far as this proceeding is concerned, must be in all things affirmed, and it is so ordered. All the judges concur.

SPECIFICATION OF ERRORS.

Now comes the defendant above named and files the following Assignment of Errors upon which he will rely in his appeal from the judgment rendered by this Honorable Court on the 24th day of April, 1914; and the mandate issued by this Honorable Court in this cause on the 11th day of July, 1914, and says that there is manifest errors in the proceedings and judgment of the United States Circuit Court of Appeals of the Eighth Circuit, and that the Court erred therein in the following particulars, to-wit:

1.

In holding and deciding that the collection of the tax which this action was brought to enjoin would constitute a taking of the property of the plaintiff without due process of law in violation of the national constitution.

2.

In holding and deciding that the granting of the Writ of Injunction directly restraining the defendant from collecting the tax in question would not be in violation of Section 3224, Revised Statutes of the United States, which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

3.

In deciding and holding that section 17 of chapter 64 of the Laws of 1907 of South Dakota is in violation of section 2 of Article 11 and section 17, Article 6, South Dakota Constitution, are void.

4.

In deciding and holding that the Board of Assessment and Equalization had no right to consider the earning power of the plaintiff's property in the state as a going concern or plant, in ascertaining its actual value, but that the lawful measure of the value of such property is the selling value of the property; the amount that can be realized in money by a sale of it within a reasonable time.

5.

In deciding and holding that the State Board of Assessment and Equalization in making the assessment upon the property of the plaintiff for the year 1910 had no authority to take into consideration the business transacted by the plaintiff in the state, or its gross or net income in the state, and that such method was not "as near as may be," the same method provided for the assessment of the property of individuals, because an assessment of the property of the plaintiff corporation at its actual value in money without a consideration of its gross earnings might have been prescribed and followed.

6.

In deciding and holding that this is a case for the exercise of equity jurisdiction.

7.

In deciding and holding that the tax imposed on the property of the plaintiff by the State Board of Assessment and Equalization for the year 1910 was unjust, excessive and unlawful; and that the action of the board in making the assessment and imposing the tax was either a gross mistake equivalent to a fraud, or an actual fraud.

8.

In deciding and holding that the plaintiff had no adequate remedy at law.

9.

In deciding and holding that the decree of the District Court of the United States for the District of South Dakota, Southern Division, rendered in this cause on April 28th, 1913,

should be reversed, and that the plaintiff was entitled to relief as prayed in its bill of complaint.

10.

That the Court erred in issuing its mandate of July 11th, 1914, to the United States District Court for the District of South Dakota, directing it to reverse its decree of April 28th, 1913, and to enter judgment for the plaintiff as prayed in its bill of complaint.

INDEX.

APPENDIX

CASES CITED.

(24,431).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 277.

GEORGE G. JOHNSON,
as Treasurer of the State
of South Dakota,
Appellant

vs.

WELLS FARGO & COMPANY

BRIEF FOR APPELLEE.

Plaintiff and appellee, Wells Fargo & Company, brought its bill in the District Court for the District of South Dakota, against the defendant and appellant, the Treasurer of the State of South Dakota, to enjoin the collection of a tax claimed by it to be illegal. From a decree of the District Court dismissing its bill for want of equity, Wells Fargo & Company appealed to the Circuit Court of Appeals for the Eighth Circuit. (*Wells Fargo & Company vs. Johnson*, 205 Fed. 60). In the Circuit Court of Appeals, the decision of the District Court was reversed. (*Wells Fargo & Company vs. Johnson*, 214 Fed. 180). The Treasurer of the State of South Dakota now appeals to this court. The facts involved in this suit are as follows:

STATEMENT OF FACTS.

This suit involves the assessment made and taxes levied by the State Board of Assessment and Equalization of South Dakota, in the year 1910, upon the property of the appellee, Wells Fargo & Company. At the date of this assessment and tax levy the South Dakota Constitution contained the following provisions:

ARTICLE VI § 2. "No person shall be deprived of life, liberty "or property without due process of law."

ARTIQLE VI § 17. "No tax or duty shall be imposed without "the consent of the people or their representatives in the legis-"lature, and all taxation shall be equal and uniform."

ARTICLE VI § 18. "No law shall be passed granting to any "citizen, class of citizens or corporation, privileges or immun-"ities which upon which the same terms shall not equally be-"long to all citizens or corporations."

ARTICLE XI § 2. "All taxes to be raised in this state shall be "uniform on all real and personal property, according to its "value in money, to be ascertained by such rules of appraise-"ment and assessment as may be prescribed by the legislature "by general law, so that every person and corporation shall pay "a tax in proportion to the value of his, her or its property. "And the legislature shall provide by general law for the assess-"ing and levying of taxes on all corporation property, as near as "may be, by the same methods as are provided for assessing and "levying of taxes on individual property."

The history of these constitutional provisions is as follows: What is now the state of South Dakota formed, prior to November 2, 1889, a part of the territory of Dakota. The legislative assembly of the territory, in 1883, enacted a statute taxing railroads upon their gross earnings (*Chap.* 99, *Laws of Dakota*, 1883). This law operated to exempt the Northern Pacific Railroad Company from the payment of taxes upon its land grant in what is now North Dakota. For this reason the statute became unpopular and, at the time of the holding, in 1885, of the convention which formulated the South Dakota constitution, it had become a political issue. The popular feeling throughout the territory was that the railroad companies, through the operation of the gross-earnings tax law, were escaping their just share of taxation and there was a strong public demand for the adoption, in the constitution of the new state, of the most stringent provisions respecting equality and uniformity in taxation and for the adoption of provisions for the assessment and taxation of individual and of all corporate property upon an *ad valorem* basis and by the same methods of assessment and levy.

The result of the political conditions then obtaining in the territory of Dakota was the inclusion in the constitution of the state of South Dakota of provisions, more stringent than these of any other state constitution, requiring uniformity and equality in all matters respecting taxation.

Respecting the revenue sections of the South Dakota constitution the supreme court of that state, in an early case, (*In re Assessment and Collection of Taxes*, 4 S. D. 6) uses the following eulogistic language:

"Unequal and unjust taxation cannot under our organic act "be permitted. Equality, justice and uniformity is the com-"mand of that instrument in all matters of taxation. Discrimi-"nation and favoritism can no longer be allowed under its pro-"visions. The rich and the poor must share alike the burdens "of taxation in proportion to the value of the property held by "each respectively."

In the course of time there arose a "Pharaoh who knew not Joseph." Political conditions changed. There were no land-grant railroads in South Dakota and the popular antipathy to

gross-earnings tax laws was forgotten. To the rising generation, the proposition of taxing corporations with reference to their earning capacity, instead of upon the basis of the property owned by them, was a very appealing one. It was discovered, that in the absence of railroad land-grants, the railroads and other public service corporations could be made to pay much greater taxes, if taxed upon their gross receipts and net incomes, than if taxed upon the valuation of their assessable tangible property. The South Dakota legislature sought to avoid, so far as possible, the effect of the revenue provisions of the constitution and to impose what amounted, in effect, to gross-earnings taxes. These statutes culminated in Chapter 64, Laws of South Dakota, 1907, which (with slight amendments made in 1909 not affecting express companies), constitutes the statute under which the assessment and levy involved in this suit was made. For convenience of reference we have printed a copy of Chapter 64, Laws of 1907 in the Appendix to this brief. (*Appendix p.* 2).

In passing, we would call attention to the fact that the constitutionality of Chapter 64, Laws of 1907, and of the other similar laws enacted by the legislature of the state of South Dakota, has always been a matter of doubt in South Dakota; so much so that the legislature of that state, in 1907, proposed an amendment to the constitution permitting the assessment of corporations with reference to their gross-earnings and net incomes (*Chap.* 96, *Laws of South Dakota,* 1907). This amendment was coupled with other propositions and was defeated at the election in 1908. The legislature again, in 1909, proposed an amendment providing, among other things, for the taxation of corporations upon their incomes (*Chap.* 187, *Laws of South Dakota,* 1909). This amendment was rejected at the election in 1910. The legislature, in 1911, for a third time, proposed a constitutional amendment permitting the taxation of corporate franchises, licenses to do business, gross-earnings and net incomes and this amendment was ratified at the election in 1912. (*Appendix p.* 2). The legislature, in 1913, passed a law providing for the reenactment of Chapter 64, Laws of 1907. (*Appendix p.* 11).

While the questions involved in this case must be decided in accordance with the statutory and constitutional provisions in force in 1909, at the time of the making of the assessment and levy in controversy, we call attention to these circumstances in the constitutional and statutory history of South Dakota as evidencing the fact that the constitutionality of Chapter 64, Laws of 1907, and all other similar statutes, has always been questioned by the legislature and by the administrative authorities of that state.

A scrutiny of the revenue provisions of the South Dakota

constitution discloses that a tax to be valid must conform to the following requirements:

FIRST: It must be equal and uniform.

SECOND: It must not be based upon any special privilege or immunity.

THIRD: It must be uniform on all real and personal property.

FOURTH: It must be levied upon all property according to its value in money.

FIFTH: The value of the taxed property must be ascertained by rules of appraisement and assessment prescribed by general law.

SIXTH: Each person and corporation must pay a tax in proportion to the value of the property owned.

SEVENTH: Taxes on corporate property must be assessed and levied by general law.

EIGHT: Taxes on corporate property must be assessed and levied, as near as may be, by the same methods as are provided for assessing and leving of taxes on individual property.

NINTH: No property, except as especially provided in the constitution, can be exempted from taxation.

TENTH: All taxation must be upon an *ad valorem* basis.

Our contention in this suit is that Chapter 64, Laws of 1907, is in clear and flagrant violation of all of the provisions of the South Dakota constitution respecting uniformity and equality in appraisement, assessment and levy and that there are about as many specific constitutional objections to be raised against it as there are clauses in the revenue sections of the constitution.

Appellee commenced transacting business as an express company in South Dakota on May 1, 1909, succeeding the United States Express Company in the conduct of the express business over the lines of the Chicago, Milwaukee & St. Paul Railway Company and its subsidiary companies The State Board of Assessment and Equalization imposed upon appellee, for the year 1909, an assessment of $200,008 upon which there was levied a twenty-five mill tax of $5,000.21. The tangible property owned by appellee in South Dakota May 1, 1909, was $13,142.45. A bill was filed in the Circuit Court for the District of South Dakota, by appellee, against the Treasurer of the State of South Dakota to enjoin the collection of the tax upon the ground of the unconstitutionality of the statute under which the assessment and levy was made and upon the further ground that the State Board of Assessment and Equalization had levied a gross-earnings tax instead of an *ad valorem* tax. Upon the hearing, before Hon. Charles A. Willard, District Judge, a final decree was entered in August, 1911, enjoining the collection of the tax. No appeal from this decree was ever taken. (*Appendix p.* 48).

The State Board of Assessment and Equalization of the State of South Dakota, at its annual meeting in August, 1910, assessed the property of appellee for taxation at the sum of $289,877 and levied upon said assessment a tax of twenty-eight mills amounting to $8,116.56. The value of the tangible property of appellee in the State of South Dakota on May 1, 1910, (the date with reference to which the statute required the assessment to be made), was but $18,473.98. Appellee tendered to the State Treasurer an amount equivalent to a tax of twenty-eight mills upon the tangible property owned by it in the state of South Dakota and upon this tender being refused filed its bill to restrain the collection of the tax which had been levied against it by the State Board of Assessment and Equalization. In the bill, the tax was assailed upon the ground of the unconstitutionality, under both the state and federal constitutions, of the statute under which the assessment and levy was made and also upon the ground of fraud and misconduct upon the part of the members of the State Board of Assessment and Equalization. Issue was joined and proofs taken, and upon the final hearing before the Hon. James D. Elliott, District Judge, the bill was dismissed for want of equity. (*Wells Fargo & Company vs. Johnson*, 205 Fed. 60). From this decree an appeal was taken, by the appellee herein, to the Circuit Court of Appeals for the Eighth Circuit. In that court the decree of the District Court was reversed for the reasons given in the opinion of Hon. Walter H. Sanborn, Circuit Judge. (*Wells Fargo & Company vs. Johnson*, 214 Fed. 180; *Appendix p.* 56). From the decision of the Circuit Court of Appeals, the treasurer of the State of South Dakota, the appellant herein, appeals to this court.

In this court, we ask for an affirmance of the decision of the Circuit Court of Appeals upon the ground that the statute, under which the assessment in controversy was made and the tax levied, is unconstitutional, both under the provisions of the Constitution of the State of South Dakota and under the Commerce Clause of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

FIRST POINT.

Our first contention is that Chapter 64, Laws of South Dakota, 1907, is in violation of the Constitution of the State of South Dakota in that it attempts to make assessments upon certain classes of taxpayers with reference to their gross earnings.

Chapter 64 Laws of 1907 (*Appendix p.* 2) provides for the assessment and taxation of railroad, telegraph, telephone, ex-

press and sleeping car companies. It contains no provisions for the assessment and taxation of the property of natural persons, or of the property of corporations other than those of the classes specified. The provisions of the law respecting the assessment and taxation of railroads are somewhat different from those respecting the assessment and taxation of telegraph and telephone companies, and those respecting the assessment and taxation of express companies and sleeping car companies differ from any of the others. Under the fifth subdivision of § 16, of Chapter 64, express companies are required to transmit to the State Auditor on or before the first day of July of each year a statement showing "the gross earnings of the total business" transacted within South Dakota for the year ending April 30th preceding. By § 17, of Chapter 64, the State Board of Assessment and Equalization is required, in assessing the property of express companies, to "take into consideration the gross earnings of said company within the state for the year ending on the 30th day of April preceding the statement made by said companies."

It will be observed in passing, that this case does not come under the doctrine laid down in the line of cases which hold that, under certain circumstances, gross earnings may be considered as a measure of the value of property for the purposes of taxation. The provisions of the South Dakota constitution clearly prohibit such a method of arriving at the assessable value of property. In no manner has the South Dakota legislature attempted to assess the property of express companies, or similar corporations, upon what is called the "unit system." The doctrines laid down in the cases arising upon assessments made upon the unit system are, consequently, inapplicable to the case at bar. This case must be considered and decided with sole reference to the peculiar and stringent provisions of the South Dakota constitution and with reference to the statutory enactments in South Dakota.

For purposes of reference there is printed in the Appendix to this brief (*Appendix p.* 12) the various sections of the South Dakota statutes relating to the assessment of the property of natural persons and of corporations, (other than railroad, telegraph, telephone, express and sleeping car companies), which are pertinent to the questions involved in this case. Nowhere in the statutes of the state, other than in Chapter 64, Laws of 1907, is there any provision whatever for the taxation of natural persons or of corporations with reference to their "gross income." All individuals, and other corporations are taxed upon the *ad valorem* assessment made upon the property owned by them, and in each instance the property is required by the statute to be assessed at its "value in money" and without any reference whatever to the use to which it is put or to the gross

income received by its owner. The result is, that if a specific tract of real property, or a specific article of personal property is owned by any private person, or by any corporation other than a railroad, telegraph, telephone, sleeping car or express company it is assessed according to its value in money and a tax levied upon that valuation alone, but if the same tract of real property, or the same article of personal property should happen to have come into the ownership of a railroad, telephone, express or sleeping car company—presto, change—it is no longer assessed at its value in money but the "gross income" of its owner must be "taken into consideration" in fixing the valuation upon the property.

Can it be, with any degree of fairness, contended that this does not violate the revenue provisions of the South Dakota constitution? There is certainly no uniformity or equality in assessment of property when its valuation is fixed, not, as in the case of other property, by what it is intrinsically worth, but by reference to the occupation and income of its owner. It can scarcely be contended that every person pays a tax "in proportion to the value of his, her or its property" when one person pays a tax based upon an assessment laid upon the intrinsic value of the property assessed while another person pays a tax upon property, identically the same in all respects and similarly situated, based upon the "gross income" which is received from the business transacted by it in the state of South Dakota. Such a procedure is in clear violation of the provision that taxes shall be assessed and levied on all corporation property as near as may be "by the same methods as are provided for the assessing and levying of taxes on individual property." It certainly cannot be contended that to assess individuals and most corporations upon the intrinsic value of their property holdings and then to assess some corporations with reference to their gross incomes constitutes an assessment "of all corporation property" as near as may be by the "same methods as are provided for assessing and levying of taxes on individual property."

In the answer of appellant to the bill in this case, he alleges that the State Board of Assessment and Equalization, in making the assessment upon the property of appellee, "took into consideration the amount of gross earnings of said company within the state for the year ending April 30, 1910" (*Record p.* 20). In the testimony of John Hirning, the State Auditor, introduced by appellant, it appears that he and the other members of the State Board of Assessment and Equalization, in making the assessment upon the property of appellee, considered "the earnings of the plaintiff company in this state, the business done by the company in this state in so far as he and the said board were able to ascertain the earnings of the said company in this state" (*Record p.* 27).

It thus appears that Chapter 64, Laws of 1907, provides that the State Board of Assessment and Equalization shall "take into consideration the gross earnings of the express companies" and that in this case it is expressly admitted by the answer that the State Board of Assessment and Equalization did so consider the gross earnings of appellee in making the assessment upon it and this admission is corroborated by the sworn statement of the State Auditor, a member of the State Board of Assessment and Equalization, who testified, that as a matter of fact, he and the other members of the board did take the gross earnings into consideration. It follows, that not only did the legislature of the state of South Dakota provide an unconstitutional method of assessment and taxation of express companies, but that the State Board of Assessment and Equalization pursued such unconstitutional methods in making its assessment and levy of taxes upon appellee.

SECOND POINT.

By § 17, of Chapter 64, Laws of South Dakota, 1907, (*Appendix p.* 9) it is made the duty of the State Board of Assessment and Equalization, annually after assessing the property of express companies, to "levy a tax upon such property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year."

The property of all individuals and of all corporations in South Dakota, other than railroad, telegraph, telephone, sleeping car and express companies, after being assessed by the local assessors in each taxing district, is taxed according to the tax levy which may be made in the taxing district in whch the property is situated. There is imposed upon all such property a state tax of a specific number of mills on the dollar of the assessed valuation, which state tax is levied by the State Board of Assessment and Equalization and is uniform throughout the state. There is also levied a county tax which consists of a specific number of mills and is levied by the boards of county commissioners of the various counties and is uniform throughout the county in which it is levied. There are also levied local taxes for municipal and school purposes of the various taxing districts, which taxes are uniform throughout the districts in which they are levied. Every taxpayer is consequently taxed, uniformly with every other taxpayer, similarly situated, in accordance with the tax requirements of the taxing district in which his property may be situated and all taxes imposed are uniform throughout each particular taxing district, from the state at large down to the lowest grade of municipal or school organization. (*Appendix pp.* 12-42).

By Chapter 64, Laws of 1907, the property of railroad com-

panies is assessed annually by the State Board of Assessment and Equalization, and by § 3 of Chapter 64 (*Appendix p.* 4) the State Board of Assessment and Equalization fixes the value per mile of railroad property in each county through which the railroad passes and fixes separately the aggregate value of the property owned by the railroad and located within the corporate limits of any city of town. By § 4 of Chapter 64 (*Appendix p.* 4) the assessment so made is transmitted to the Board of County Commissioners of each county through which the railroad runs and the Board of County Commissioners adds the railroad valuation to the assessment list of each special taxing district of the county and spreads thereon the same levy as is imposed for the current year upon other property. The result of these provisions is that the property of railroad companies in South Dakota is subject to the same tax levy upon its property, situated in each taxing district in which it has property, as that imposed upon the property of individuals situated in such taxing district, which is an attempt at least upon the part of the legslature to place the property of railroad companies, in this respect, upon a parity with the property of individuals.

With telegraph, telephone, sleeping car and express companies the legislature, in enacting Chapter 64, Laws of 1907, abandoned all pretense at a uniformity of tax levy and by § 17 provided that the Board of Assessment and Equalization should, after making the assessment, levy a tax upon the property of express companies, "which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year." (*Appendix p.* 9).

In other words, while the taxes upon the property of individuals, and the property of all excepting certain classes of corporations, are based upon the requirements and tax levies of the taxing districts in which the property is situated, and while even the property of railroad companies is taxed according to the same method, telegraph, telephone, express and sleeping car companies are taxed under a different system from that applied to individuals or to any other classes of corporations. Instead of being taxed according to the requirements of the taxing districts in which their property may be located they are taxed at such sum as the State Board of Assessment and Equalization may find to be the "average" tax levy for all purposes, state, county and local, upon all property throughout the state for the preceding year.

We submit that this method of taxation of telegraph, telephone, sleeping car and express companies is in violation of the constitutional provisions in regard to uniformity of assessment and of taxaton. The property of other taxpayers is taxed according to the requirements of the locality in which it is sit-

uated, but telegraph, telephone, sleeping car and express companies must pay taxes proportionate to the average taxes paid by other property owners in all the taxing districts throughout the entire state. It is a matter of common knowledge that the tax requirements of various communities differ very materially. The taxes in a township, or in a county village are never as high as those in a city, and the general rule seems to be that the larger and more completely organized the community the greater are its tax requirements. The rule of taxation laid down by Chapter 64 consequently leads to gross injustice. For instance, a farmers' telephone company, organized for the purpose of intercommunication between the residents of a farming community, would be situated wholly within a district within which the rate of taxation might not exceed ten or fifteen mills, while for the same year the tax levy in the larger municipalities of the state, like Sioux Falls, or Huron, or Deadwood, might reach or exceed sixty-five mills. Under the rule laid down by Chapter 64 the farmers' telephone company is taxed upon the "average rate" of taxation, which includes all of the taxing districts of the state, and in consequence the rate of taxation of the farmers' telephone company greatly exceeds the rate of tax paid by the other property owners of the district in which its property is situated.

It is the invariable rule that the rate of taxation increases proportionately to the density of the population. The aggregate of the assessments at the centers of population (and at which the highest rate of taxation prevails) are very much greater than are the aggregate of the assessments in the sections where the rate is low and the population sparse, and where the amount of assessable property is less than in the densely populated areas. It is to be presumed that the South Dakota taxing authorities arrived at the "average amount of state, county, school, municipal, road, bridge and other taxes" by taking the total taxes levied and the total valuation throughout the state. If this be true the preponderance of property values in the sections where the higher rate is charged would tend to increase the average very materially and may be illustrated by the following example: In one section of the state $1,000 in value is assessed at $.010 and in another section of the state $100,000 in value is assessed at $.030. The average of the two rates $.010 and $.030 would be $.020 but the average which the assessment actually bears to the total property assessed is little over $.028.

It would scarcely seem that such a method of assessment and taxation complies with the uniformity and equality provisions of the South Dakota constitution. Such a rule deprives the property owner of the benefit of the selection of a situs for his property and makes him share the tax burdens of distant communities in which he has no interest and over whose finan-

cial affairs he can possess no control.

THIRD POINT.

There is still another objection to the method of tax levies on express companies provided by Chapter 64, Laws of 1907. In each taxing district of the state the taxes are assessed upon the property of individuals and of all corporations excepting telegraph, telephone, sleeping car and express companies according to the tax requirements of the year in which the tax levy is made. In the case of telegraph, telephone, sleeping car and express companies the tax levy for any given year is based upon the "average amount" of taxes levied throughout the state upon other property "for the preceding year." (*Appendix p.* 10). In other words, while all other property is taxed upon the basis of the requirements for the year in which the tax is imposed, telegraph, telephone, sleeping car and express companies are required to pay a tax based upon the average tax requirements throughout the state upon other property for the preceding year. This, we submit, constitutes a distinct violation of pretty nearly all of the requirements of the South Dakota constitution respecting uniformity and equality in assessment and taxation. It is notorious that tax levies of all taxing districts vary from year to year and the taxes for any given year are almost uniformly either higher or lower than the taxes for the preceding year in the same taxing districts. Notwithstanding this fact, the legislature of the State of South Dakota has attempted to make telegraph and telephone, sleeping car and express companies pay a tax based upon the taxes paid upon other property for the preceding year, while all other property owners pay taxes based upon the tax requirements for the current year.

Owing largely, we presume, to the fact that the revenue provisions of the constitution of the state of South Dakota are so radically different from those of almost all of the other states there are few authorities to be found in other jurisdictions which will serve as precedents in this case. The Supreme Court of Michigan, however, had occasion, in the case of *Pingree v. Auditor General*, 120, Mich. 95, to pass upon a statute practically identical with Chapter 64, Laws of 1907, so far as respects the levying of the tax upon telegraph, telephone, sleeping car and express companies. A Michigan statute provided, in substance, that the Auditor General, State Treasurer and Commissioner of the State Land Office should assess telegraph and telephone lines and levy a tax upon the assessment so made "at a rate which shall equal the average rate of taxes, general, municipal and local, levied throughout the state during the previous year." The Michigan constitution provided, "The legislature shall provide an uniform rule of taxation except upon property

paying specific taxes, and taxes shall be levied upon such property as shall be prescribed by law." It also provided that "all assessments hereafter authorized shall be on property at its cash value." These provisions, as will be seen, are vastly weaker than the very stringent ones contained in the South Dakota constitution. The Supreme Court of Michigan, in *Pingree v. Auditor General*, held that this statute violated the constitutional rule of uniformity and was consequently invalid, three of the five judges of the court writing separate opinions and all of them concurring as to the unconstitutionality of the law as violating the rule of uniformity. In discussing the case the court uses the following language:

"The taxes generally assessed for the State bear a propor-"tion to the amount to be raised, and all taxable property, ex-"cept that paying specific taxes, is charged with a given and "equal per centum upon its assessed value. That cannot be "said of this property, for the rate is to be the average of all "taxes raised for all purposes—local as well as state. It is not "a specific tax, and it is not within the uniform rule of taxation "prescribed for other property, and the law providing for it "must therefore be held void."

The court also held that the fact that the law in question had been upon the statute books of the state of Michigan for twenty years, during which period it had been acquiesced in and followed without objection, did not render it any the less unconstitutional.

Aside from *Pingree v. Auditor General* we have been able to find no reported case bearing upon this precise objection to the constitutionality of Chapter 64, Laws of 1907, but we submit, that if, under the very weak provisions of the Michigan constitution requiring uniformity, such a method of taxaton was held invalid, the identical method must be clearly declared obnoxious to the very sweeping and drastic provisions of the South Dakota constitution.

FOURTH POINT.

By § 17 of Chapter 64, Laws of 1907, (*Appendix p.* 10) the State Board of Assessment and Equalization levies a tax upon the property of express and sleeping car companies which, under § 19 of Chapter 64, is payable on or before the 1st day of March succeeding the levy. By § 20 of Chapter 64 (Appendix p. 10) the State Treasurer is required to "apportion the amount of taxes received under the provisions of this act between the state and the various counties in which such company is doing business," and after receiving the money the "County Treasurer shall distribute the portion received by his county to the various county and local funds according to the levies made upon

other property for the preceding year." (Appendix p. 11). These provisions are somewhat ambiguous but it would seem to be the intent of the legislature, in enacting them, to require the taxes paid by express and sleeping car companies to be apportioned to the various taxing districts in which the companies transact business in the proportion which the mileage in each taxing district bears to the entire mileage of the company in the state. Whether this or some other rule be the true method of "apportioning" the sleeping car and express company taxes between the different counties and taxing districts pursuant to the provisions of § 20 of Chapter 64 is immaterial for the purposes of this case, as we submit that the entire theory of the levy and distribution of the tax is repugnant to the plain provisions of the South Dakota constitution.

Our contention is that the arbitrary apportionment among the various taxing districts of the state, upon a mileage basis, of the taxes paid by railroad, telegraph, telephone, express and sleeping car companies, as provided by Chapter 64, Laws of 1907, is in violation of the provisions of the South Dakota constitution respecting uniformity and equality of taxation as well as of those provisions requiring taxes to be in proportion to the value of the property taxed and that the assessing and levying of taxes on corporation property shall be "as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property." The property of individuals and of all corporations, excepting railroad, telegraph, telephone, sleeping car and express companies, is assessed by the local assessors in each taxing district and pays the rate of tax levied upon all other property within the same taxing district. By the division of the property of railroad, telegraph, telephone, express and sleeping car companies upon a mileage basis the assessment is made, not upon the property situated in each taxing district, but upon the proportion which the mileage within the taxing district bears to the aggregate mileage in the state. If the value of each mile of the mileage owned by the corporation so taxed was equal in value to each other mile or mileage, then the system prescribed by Chapter 64 might be defended, but as everyone knows, there exist the greatest differences in the value of the property upon different parts of the systems of the railroad, telegraph, telephone, express and sleeping car companies. For instance a railroad may, in one taxing district, own a single track constructed over a level stretch of country and in the next taxing district own a double track system with deep cuts and fills, bridges, and other structures. The cost of constructing one mile of track may not exceed $5,000 while another mile may cost more than $500,000. So with telephone companies. The exchange may be situated in one taxing district but there may be toll lines extending out for many miles

to make connections with distant customers. To pro rate the assessment upon a mileage basis is to deprive the taxing district wherein the exchange is situated of a great portion of the taxable property to which it is entitled. With express companies the argument applies with still greater force. In the larger cities they own horses, teams, office furniture and other valuable paraphernalia but in the smaller offices they have practically no tangible property and upon the railroad routes over which they transact business they own no property whatever.

This same subject was considered by the Supreme Court of Tennessee under a constitutional provision in some respects similiar to that of South Dakota and under a statute in all important particulars identical with Chapter 64, Laws of 1907. The Tennessee constitution provides as follows:

"All property, real, personal or mixed, shall be taxed; all "property shall be taxed according to its value, that value to "be ascertained in such manner as the Legislature shall direct, "so that Taxes shall be equal and uniform throughout the State. "No one species of property from which a tax may be collected, "shall be taxed higher than any other species of property of the "same value."

A Tennessee statute provided for the making of reports by the railroad companies and the assessment of their property, in substantially the same manner as is provided by Chapter 64 and for the apportionment of the mileage among the different taxing districts the same as is done with railroads under Chapter 64. In the case of *City of Chattanooga v. Railroad Company*, 7 *B. J. Lea*, 561, the Supreme Court of Tennessee held this statute in violation of these provisions of the Tennessee constitution. In discussing the case the court uses the following language:

"What the value of this property is by this process, we "are not able to say, but we certainly know it is not the rule of "taxation fixed for all other like property in the State and we "know of no constitutional principle on which railroad prop- "erty of this character can be valued by a different rule from "that of other citizens.

"We may illustrate the inequality involved in this process "by another example. Suppose a county near the line of the "State, as Shelby; a railroad from Mississippi comes into the "county to the city of Memphis, say six miles; in that city it "has depots, warehouses, office on lots of ground of large value; "assume such property, as city property, worth five hundred "thousand dollars; suppose the valuation of the track as reached "by this process, shall be five thousand dollars per mile, mak- "ing thirty thousand dollars. Here is property in the county "worth five hundred thousand dollars, which pays a tax to the "county at a value of thirty thousand dollars, the real value of

"which is five hundred thousand dollars, excluding the value "of the stock. The real and personal property of the citizen "along that line in the county and around that depot, ware- "house and other buildings, is taxed at its market value, of five "hundred thousand dollars, if worth that sum, while the prop- "erty of the railroad is taxed at thirty thousand dollars. Is "this in accord with the principle of equality, or is the property "taxed according to its value by this process? We hardly think "any one would so contend. Yet this, we take it, is a fair illus- "tration of the assessment found in the act under discussion.

"But we may add other illustrations as to property in in- "corporated towns and cities. There may be only half a mile of "road within the corporate limits, and the road assessed fifty "thousand dollars per mile—much more, we believe, than any "assessed mile has been valued at—which would give twenty- "five thousand dollars for taxation. While there may be de- "pots, warehouses, machine shops, and all the offices attached "to a great railroad center, worth, valued as property, five hun- "dred thousand dollars; yet the city can only tax it at the value "arrived at by the assessors, as on a half mile of track value. "It is seen in this case something of a fair illustration of the "workings of this process; where the valuation by the assessors "if forty-one thousand four hundred and eighty dollars, while "the county assessors, on the basis of assessments of the citizens' "property, give a valuation of one hundred and twenty thous- "and six hundred and ten dollars.

"Other illustrations of the inequality in valuation resulting "from the principle of the statute, might readily be given, but "this must suffice. We think it beyond doubt, the principle of "the act of the Legislature discussed is in violation of the pro- "visions of the Constitution, and therefore the enactment a "nulity."

We submit that the reasoning of the Supreme Court of Tennessee applies with double force to the use at bar under the much more stringent provisions of the South Dakota constitution. Chapter 64 operates to deprive the various taxing districts of the state of the right to assess and tax the property of the railroad, telegraph, telephone, sleeping car and express companies situated within the respective limits of each taxing district and in lieu apportions to each taxing district, regardless of the value of the property situated within it, a pro rata share, upon a mileage basis, of the entire mileage of each corporation within the state. This violates the constitutional provisions of equality and uniformity. It results in the assessment of property without regard to its value in money. It violates the provision that each person and corporation shall pay a tax in proportion to the value of the property owned and it is in direct conflict with the constitutional provisions for the assessment

and levying of taxes on corporation property the same as "near as may be" by the same methods as are provided for assessing and levying of taxes on individual property.

FIFTH POINT.

Under the laws of South Dakota all property of individuals and of corporations other than railroad, telegraph, telephone, express and sleeping car companies is assessed by the local assessors in each taxing district and taxes levied by the local taxing authorities. In each taxing district there is a board of equalzation and in each county there is also a county board of equalization (*Appendix pp.* 11-48).

Under the provisions of Chapter 124, Laws of South Dakota 1907, (*Appendix p.* 47), any taxpayer feeling aggrieved may appeal from any decision of the board of equalization of any city, town, township or county to the circuit court, the appeal being taken in the same manner as provided for the taking of appeals from decisions of the boards of county commissioners, that is by filing an undertaking conditioned for the prosecution of the appeal and payment of costs which may be adjudged in the circuit court. (*Appendix p.* 47).

It will thus be seen, that with the exception of railroad, telegraph, telephone, express and sleeping car companies all taxpayers in South Dakota possess the right to appeal to the circuit court from the action of the various local boards of equalization. The decision of the circuit court is in all cases reviewable by the supreme court, so that any taxpayer, other than railroad, telegraph, telephone, sleeping car and express companies, possesses the right of appeal from the action of the various boards of equalization to the courts and to have his assessment reviewed by the courts of the state.

There is no provision whatever in Chapter 64, Laws of 1907, or in any other statute of the state of South Dakota, permitting any appeal from the action of the State Board of Assessment and Equalization in assessing the property of the corporations assessed by it. It is the last, as well as the first tribunal to which such corporations must submit in all matters relating to assessment and taxation and from the action of the State Board of Assessment and Equalization no recourse whatever to the courts, or to any other tribunal, is provided.

We contend that the failure of the legislature to provide a right of appeal to express companies, and to the other corporations assessed and taxed by the State Board of Assessment and Equalization, operates to deprive such corporations of their property without due process of law, gives to other citizens and corporations privileges and immunities not given to the express companies and is in violation of the constitutional provisions for

the assessment and levy of taxes on corporation property by the same methods as are provided for the assessment and levy of taxes on individual property.

SIXTH POINT.

By § 19 Chapter 64, Laws of 1907, the tax assessed upon express companies falls due upon the 1st day of March succeeding the assessment. By § 21 it is provided that in case the tax be not paid for thirty days after it becomes due there shall be added a penalty of 12% per annum. (*Appendix p.* 11).

By § 22 it is provided that at any time after the expiration of thirty days from the date the tax falls due the State Treasurer shall distrain, advertise and sell sufficient property to pay the tax together with the penalty and the costs of sale. (*Appendix p.* 11).

By § 2192, Pol. Code of South Dakota, which is the statute governing the collection of all taxes other than those upon telegraph, telephone, express and sleeping car companies, it is provided that all taxes shall become delinquent on the 1st day of March of the year after which they have been assessed and that a penalty of 1% per month shall thereafter attach (*Appendix p.* 43). So far, the provisions of § 2192, Pol. Code, do not differ from the provisions of Chapter 64, but it is further provided by § 2192, Pol. Code, "that if any person shall pay one-half of "the amount of taxes due from him on or before the 1st day "of March of the year in which such taxes shall have been "assessed the balance shall not become delinquent until the 1st "day of October thereafter, upon which day if not paid a penal-"ty of 1% a month thereafter shall be paid, etc." (*Appendix p.* 43).

It will thus be seen, that while all taxpayers, other than telegraph, telephone, sleeping car and express companies, can, if so minded, pay one-half of their annual tax before the 1st day of March of each year and are by so doing granted an extension of time of payment of the remaining half up to and including the 30th day of the succeeding September, no such provision exists as to the payment of one-half of the taxes of telegraph, telephone, express and sleeping car companies. They are obliged to pay the entire tax and the payment of one-half of it does not operate to extend the time of payment of the remainder.

The practical discrimination which the South Dakota statutes make against telegraph, telephone, sleeping car and express companies and in favor of all other classes of taxpayers, both individuals and corporations, can be illustrated by a computation as to the effect which the statute would have upon the payment by appellee of the tax involved in this case. As has been seen, the tax levied by the State Board of Assessment and Equalization upon appellee for the year 1910 amounted to

$8,116.55. Supposing a tax of the same amount had been levied by the proper taxing authorities upon the property, either real or personal, of any taxpayer in the state of South Dakota other than a telegraph, telephone, sleeping car or express company. The legal rate of assessment in South Dakota is 7%. Under the statute, appellee, in order to escape the penalty of 1% per month, would be obliged to pay the entire sum of $8,116.55 before the 31st day of March, 1911. Any taxpayer other than a telegraph, telephone, sleeping car or express company could, by paying one-half of the tax on February 28th, 1911, have the time of payment of the balance extended until September 30, 1911, a period of seven months. The taxpayer so paying would consequently save interest at the rate of 7% for seven months on one-half of $8,116.55, or $4,058.27, which would amount to $165.71. Appellee, however, would be allowed the benefit of 7% of $8,166.55 for one month, between March 1st and March 31st which would amount to $47.34. Deducting this amount from the $165.71 in interest saved by the other taxpayer would leave a net difference of $128.37 in favor of the private taxpayer and against appellee. In other words, under the South Dakota statute in regard to the time of payment of taxes there is a discrimination against telegraph, telephone, sleeping car and express companies which in the case of the tax in controversy in this action would amount to $128.37. While this would amount to less than 2% of the entire tax it is, nevertheless, a discrimination and as such violates the constitutional rule of uniformity and equality in taxation as well as the rule respecting the assessment and levying of taxes on corporate property by as near as may be the same means as are provided for the assessing and levying of taxes on individual property.

SEVENTH POINT.

As has been seen, under the provisions of § 22 of Chapter 64, Laws of South Dakota, 1907, (*Appendix p.* 11), it is made the duty of the State Treasurer to distrain and sell property for the non-payment of the tax levied upon any express company, provided the tax be not paid within thirty days from March 1st of each year, that is if it be not paid on or before March 30th. By the provisions of § 2185 Pol. Code the property of tax payers who have not paid their personal property taxes is not distrained and sold until after October 1st of the year succeeding the year for which the tax is imposed (*Appendix p.* 42), and under § 2195 Pol. Code real property is not sold for delinquent taxes until the second Monday in November of the year succeeding the year for which the assessment is made (*Appendix p.* 44).

Here again is a discrimination against telegraph, telephone, sleeping car and express companies. Whether the tax against them be considered as a personal property tax or as a real prop-

erty tax an equal discrimination exists. If they do not pay the tax as levied, not later than March 30th of the year succeeding the year for which the levy is made, their property is distrained and sold, while the property of other taxpayers owing personal property taxes, is not distrained and sold until after the 1st of the succeeding October and real property is not sold until the second Monday of the succeeding November.

It may be contended that the discrinimation between telegraph, telephone, express and sleeping car companies on the one hand and the other taxpayers of the state upon the other with respect to the time of the payment of the taxes and time within which property can be distrained and sold for non-payment of the tax is so slight that it should not operate to avoid the tax. Our position is that each taxpayer of the state of South Dakota is entitled to a legal assessment and levy of taxes before he can be required to pay the amount levied and that it is immaterial that a legal assessment and levy might yield substantially the same tax as that produced by the illegal methods of assessment and levy. This precise question was passed upon by this Court in the case of *Owensboro National Bank v. Owensboro*, 173 U. S. 664. In delivering the opinion of the court Mr. Justice White uses (p. 683) the following language:

"Whilst this conclusion suffices to dispose of the case, we "advert to the contention that although there may not be a "legal equivalency, there is nevertheless one in fact, and there- "fore the tax should be sustained. It may be that in the case "before us, there is a coincidence between the sum of the tax "levied upon the corporation and the amount which would have "been imposed had the shares of stock in the names of the share- "holders been assessed according to the act of Congress. But "that this is not the necessary result of the taxing statute is "too plain to require comment. The fact that it is not is well "illustrated by *Henderson Bridge Company v. Kentucky, supra,* "for there the tax which was sustained on the franchise or in- "tangible property of the corporation admittedly enormously "exceeded the total of the capital stock, and proceeded upon the "theory that the bonds issued by the corporation were an ele- "ment to be taken into consideration in fixing the value of the "franchise or intangible property. If the mere coincidence of "the sum of the taxation is to be allowed to frustrate the pro- "visions of the act of Congress, then that act becomes meaning- "less and the power to enforce it in any case will not exist. This "follows since if mere coincidence of amount and not legal "power be the test, only a pure question of fact would arise in "any given case. The argument that public policy exacts that "where there is an equality in amount between an unlawful tax "and a lawful one, the unlawful tax should be held valid, does "not strike us as worthy of serious consideration."

EIGHTH POINT.

With the exception of railroad, telegraph, telephone, sleeping car and express companies, the property of all individuals and corporations in South Dakota is assessed by uniform methods and instrumentalities. In each municipal organization, including cities of the first, second and third classes, cities under commission, incorporated towns and townships, there is elected, or appointed, a local assessor whose duty it is to make an assessment of the property subject to taxation within the limits of the municipality of which he is the assessor. In counties which are not organized into townships there is a county assessor who performs the duties of the township assessors in the counties with township organizations. (*Appendix pp.* 12-42).

In each instance, there is a local board of equalization in each municipal organization which reviews the work of the assessor. In each county there is a county board of equalization which in turn reviews the work of the various boards of equalization within the county. The assessments as equalized by the county boards of equalization are again equalized as between the various counties and classes of property by the state board of equalization. (*Appendix pp.* 12-42).

Upon the assessment, as made by the local assessor and finally equalized by the local board of equalization, the county board of equalization and the state board of equalization, there is levied a tax for state purposes by the state board of equalization, which tax is uniform throughout the entire state; a tax for county purposes by the board of county commissioners which is uniform throughout the county; a tax by the common council, board of commissioners, board of trustees, or township trustees of the local municipality, which is uniform throughout the municipality; and a tax by the school board of the district in which the property assessed is situated which is uniform throughout the school district. These various tax levies are certified to the county treasurer who collects the aggregate tax and distributes the amount collected among the various taxing bodies. (*Appendix pp.* 12-44).

The assessment of all property is made and equalized in June, July and August of each year and the valuation is fixed as of the preceding May 1st. The tax levy is due on December 1st after the assessment, and becomes delinquent if not paid before the succeeding March 1st. If the personal property tax remain unpaid until after the 1st of the next October it is placed in the hands of the sheriff for collection by distraint. If the real estate tax be not paid it is advertised by the treasurer in October for sale and is sold in November. Should there be no redemption a tax deed is issued at the expiration of two years. (*Appendix pp.* 12-44).

The assessing officers are required to assess all property at its full value, but in no case is any provision made for the assessment or taxation of other than tangible values. No provision whatever is made for the taking into consideration of the use to which any special item of property is put or of the income which is obtained from it. (*Appendix pp.* 12-44).

With railroad, telegraph, telephone, sleeping car and express companies an entirely different system of assessment and taxation is provided by Chapter 64, Laws of 1907. These corporations are entirely removed from the jurisdiction of the local assessors and of the local, county and state boards of equalization and are placed under the jurisdiction of a board termed the State Board of Assessment and Equalization which is composed of the same officers as compose the State Board of Equalization. In making the assessment and levying the taxes upon railroad, telegraph, telephone, express and sleeping car companies the members of the board act in a different capacity from what they do when forming the State Board of Equalization and constitute the State Board of Assessment and Equalization (*Appendix pp.* 9-10).

It is our contention that the provisions of Chapter 64, Laws of 1907, making railroad, telegraph, telephone, sleeping car and express companies subject to assessment and to taxation by the State Board of Assessment and Equalization instead of by the local assessors and taxing authorities is in clear and distinct violation of the constitutional provisions for the "assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for assessing and levying of taxes on individual property."

NINTH POINT.

There is no decision of the Supreme Court of the State of South Dakota which construes Chapter 64, Laws of 1907, as being constitutional. Counsel for appellant cite the case of *State ex rel. American Express Company v. State Board of Assessment and Equalization,* 3 S. D. 338, as being an authority in favor of the constitutionality of this act. An examination of that case will disclose the fact that the question of the constitutionality of the statute involved was never raised by either side to the litigation and was not discussed, or even suggested, by the court or counsel. The case involved an assessment made under a statute enacted in 1891 which contained provisions similar to some of those contained in Chapter 64, Laws of 1907, but the sole question raised or decided in *State ex rel. American Express Company v. State Board of Assessment and Equalization* was whether certiorari was a proper remedy with which to review an assessment made by the State Board of Assessment and Equalization. No question as to the constitutionality of

the statute was involved in the case and it is consequently not in any manner an authority in point in this case.

Practically the only discision of the Supreme Court of South Dakota applicable to the issues in this case is *In re Assessment and Collection of Taxes*, 4 S. D. 6. In that case the question involved was the constitutionality of a statute passed in 1891 regarding the assessment, levy and collection of taxes and which provided, that in the listing of credits, the person making the list might deduct from the gross amount thereof "the amount of all bona fide indebtedness." The Supreme Court of South Dakota, in an elaborate opinion, held this provision unconstitutional as being in violation of the clauses of the state constitution requiring equality and uniformity in the making of assessments and levying of taxes. The court quotes with approval the following language of Mr. Justice Paxton, *In Fox's Appeal*, 112 *Pa. St.* 337:

"The exception of 'Notes or bills for work or labor done' is "clearly a violation of Article 9 of the constitution. This be- "longs to a species of class legislation that has become very "common—more common than commendable—the object of "which is to favor a particular class at the expense of the rest "of the community. So far as such legislation affects the ques- "tion of taxation the constitution has put an end to it. There "can be no more of it; nor should there be. The constitution "protects all classes alike. The rich and poor alike enjoy its "benefits, and must share the burdens which it imposes. How- "ever popular such legislation may be, it cannot be sustained "under our present constitution. But for this vice we are not "required to declare the act of 1885 void. The second section "of Article 9 of the constitution provides: 'All laws exempting "property from taxation, other than the property above num- "erated, shall be void.' The exception of 'notes or bills for work "or labor done' is void under this provision, and drops out of "the act of 1885. The exception falls, but the act stands. It "will be the duty of the assessors to assess and return such bills "or notes the same as other moneyed securities in the hands of "individuals."

The Supreme Court of South Dakota then itself uses the following language:

"The cases illustrate the change made in the modern consti- "tutions containing provisions similar to our own on the sub- "ject of taxation, and the reasons for the chance, and also the "importance of preserving these valuable provisions of the con- "stitution from being frittered away under the guise of deduc- "tions, on the theory that deductions are not exemptions, and "preventing the legislature from discriminating under various "pretexts between different classes of property that shall bear "the burdens of taxation. * * * * * * * * Unequal and unjust

"taxation cannot under our organic act be permitted. Equality, "justice and uniformity is the command of that instrument in "all matters of taxation. Discrimination and favoritism can "no longer be allowed under its provisions. The rich and the "poor must share alike the burdens of taxation in proportion "to the value of the property held by each respectively. The "basis of taxation is property itself, not the owner's interest "therein."

In the light of the foregoing utterances of the Supreme Court of the State of South Dakota there would seem to remain but slight basis for the contention that in the earlier case of *State ex rel. Express Company vs. State Board of Assessment and Equalization*, 3 S. D. 338, the court intended to affirm the constitutionality of a statute containing provisions similar to those comprised in Chapter 64, Laws of 1907.

After the filing of the opinion in this case by Judge Walter H. Sanborn in the Circuit Court of Appeals, the Governor of South Dakota made a formal request of the Judges of the Supreme Court of that state, for an opinion as to the constitutionality, under the provisions of the South Dakota state constitution, of Sections 16 to 23 of Chapter 64, Laws of 1907. The avowed purpose of this proceeding was to obtain, if possible, an opinion from the Supreme Court of South Dakota, affirming the constitutionality of the South Dakota statute, which this court and the other federal courts would be obliged to follow. The judges of the Supreme Court of South Dakota refused to comply with the request of the Governor or to render a decision upon the constitutionality of Chapter 64, Laws of 1907, in advance of the submission to the court of a case involving that statute. In the reply made to the Governor, the judges of the South Dakota Supreme Court, used the following language:

"The disclosed purpose of the questions is based upon the "suggestion of the Attorney General that the opinion of the "judges might be at variance with the recent opinion of Mr. "Justice Sanborn in the Express Company Case, and that there- "fore, upon a petition for rehearing, or upon a review by the "Supreme Court of the United States, the federal courts would "be obligated to follow the opinion of the judges of this court. "It is clear to us that the duty of the federal courts to follow "the decision of a state court in matters pertaining to the con- "struction of a state Constitution does not comprehend advisory "opinions of judges which do not have the force of judicial de- "cisions. An opinion in this case, if given by us, would have no "more binding effect upon the federal courts than the opinion "of any five South Dakota lawyers of repute."

The entire proceedings in the matter of the request made by the Governor of South Dakota upon the Supreme Court of that state for an opinion upon the constitutionality of Chapter 64,

Laws of 1907 and the refusal of the Judges of the Supreme Court to comply with the request are to be found *In re Opinion of the Judges,* 34 S. D. 650; s. c. 147 N. W. Rep. 729.

In the light of the decisions of the Supreme Court of South Dakota, and of the refusal of the judges of that court to comply with the request of the Governor and render an ex parte decision upon the constitutionality of Chapter 64, Laws of 1907, we submit that there is no decision or other proceedings of the South Dakota courts which precludes this court from passing upon the constitutionality of the statute in this case.

TENTH POINT.

For the reasons discussed in the foregoing portions of this brief, points one to nine, we contend that Chapter 64, Laws of 1907, is unconstitutional, as being in violation of the revenue provisions of the South Dakota Constitution in the following particulars to-wit:

FIRST: The statute provides that "gross earnings" shall be taken into consideration in making the assessments upon railroads, telegraph, telephone, sleeping car and express companies, while nothing but the actual, tangible value is taken into consideration in making the assessment upon the property of individuals and of all other corporations. This violates the constitutional provisions of equality and uniformity in both the assessment and tax and in the methods of making the assessment and levying the tax.

SECOND: The statute provides for the levying of a tax upon the property of telegraph, telephone, express and sleeping car companies (regardless of its situs) equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property. All other property, both of individuals and of corporations in South Dakota, is taxed according to the requirements of the taxing district in which it is situated. This is again a violation of the constitutional provisions of equality and uniformity.

THIRD: The statute provides that telephone, telegraph, sleeping car and express companies shall pay a tax based upon the average amount of taxes paid by other property in the state "for the preceding year." All other property, both of corporacurrent year, and to base the taxes of telegraph, telephone, tions and of individuals, is taxed according to the requirements of the various taxing districts in which it is situated for the sleeping car and express companies upon the tax of the preceding year is to violate the rules of equality and uniformity.

FOURTH: The statute provides for the apportionment of the taxes, upon railroad, telegraph, telephone, express and sleeping car companies, upon a mileage basis among the different taxing districts in which these companies own property, regardless of

the districts in which each particular item of property is situated. This results in the grossest inequality of taxation.

FIFTH: All individuals and corporations other than railroad, telegraph, telephone, express and sleeping car companies have the right of appeal to the circuit courts. There is no appeal provided to any court, or other tribunal, from the decision of the State Board of Assessment and Equalization. This violates the rule of equality and uniformity and also the rule providing for uniformity of methods of assessment and levying of taxes.

SIXTH: Telegraph, telephone, sleeping car and express companies are required to pay the taxes assessed upon them on or before March 30th of each year while all other taxpayers are entitled to pay one-half of their taxes before March 1st and to obtain an extension of the payment of the remaining half until the first day of October. This is a discrimination against telegraph, telephone, sleeping car and express companies and violates the rule of equality and uniformity.

SEVENTH: In case of the non-payment of the taxes of express companies on or before March 30th of each year it is the duty of the state treasurer to distrain and sell the property of the company. In the case of other taxpayers property is not distrained and sold until October 1st of the year succeeding the year for which the tax is imposed and in the case of real property there is no sale until the second Monday in November of the year succeeding the year for which the assessment is made. Here again is a clear discrimination against express companies which violates the law of uniformity and equality.

EIGHTH: Railroad, telegraph, telephone, express and sleeping car companies are assessed by the State Board of Assessment and Equalization, a board which possesses no duties excepting those of assessing such corporations and levying taxes upon them. All other taxpayers, both corporations and individuals, in the state are assessed by the local assessors, their assessments equalized by local, county and state boards of equalization and taxes levied by the state, county and local authorities and collected by the county treasurer. The entire revenue machinery of the state, from the making of the assessment to the enforcement of the collection of the tax, is changed when it comes to telegraph, telephone, express and sleeping car companis. So radical a difference in methods of assessment and levying of taxes is wholly unjustified under the constitutional provision that the assessing and levying of taxes on all corporation property shall be "as near as may be by the same methods as are provided for assessing and levying of taxes on individual property."

ELEVENTH POINT

Laying aside for the time being the question as to the con-

stitutionality of Chapter 64, Laws of South Dakota, 1907, we contend that the record in this case discloses the fact, that the proceedings of the State Board of Assessment and Equalization of the State of South Dakota, in making the assessment and levying taxes for the year 1910 upon the property of Wells Fargo & Company, the appellee herein, were constructively, at least, fraudulent and of such a character as to violate the entire proceedings.

An assessment was made and a tax levied upon appellee by the State Board of Equalization of the state of South Dakota for the year 1909, which assessment and levy was made under circumstances almost identical with those which surround the assessment and levy made for the year 1910, and involved in this suit. A bill was filed by appellee in the Circuit Court for the District of South Dakota to enjoin the collection of the 1909 tax. Issue was joined and the suit proceeded to final hearing and resulted in a decree granting a permanent injunction against the collection of the tax. The decree was entered by Judge Charles A. Willard of the district of Minnesota, sitting as presiding Judge in the district of South Dakota. No appeal was ever taken from this decree and the time for appeal long ago expired. In view of the fact that District Judge Elliott of South Dakota, in the case at bar took a view different from that held by Judge Willard in the 1909 case we print in the Appendix to this brief the opinion of Judge Willard in the 1909 case. (*Appendix p.* 48).

We contend, in the case at bar, that the evidence shows conclusively that no valid assessment was ever made by the State Board of Assessment and Equalization, for the year 1910 and that the State Board of Assessment and Equalization, instead of assessing the property of appellee at its actual and true value and then levying a tax upon it, made a forced valuation of the property of appellee which would yield a tax equivalent to an income tax upon the income of appellee from both its intrastate and interstate business in South Dakota for the year ending April 30, 1910; a tax which would be illegal both under the provisions of the South Dakota constitution and under the commerce clause of the federal constitution.

Judge Willard, in his opinion in the 1909 case, (*Appendix p.* 48) found by simple arithmetical computations that the State Board of Assessment and Equalization had attempted to impose a gross earnings tax of 4% upon the operating revenue, or 2% upon the gross earnings of the express companies for the year ending April 30, 1909. In the case of the 1910 tax, which is the one involved in the action at bar, a similar computation just as clearly evidences the fact that the State Board of Assessment and Equalization again proceeded to levy upon the express companies a tax which was based, not upon the value of the prop-

erty of the express companies in South Dakota, but upon the earnings of such companies, both interstate and intrastate, during the year. These computations show that the tax levy was based solely upon the amounts shown by the reports of the railroads to have been paid them by the express companies for both interstate and intrastate services in South Dakota for the year ending April 30, 1910. The record discloses the fact that the express companies paid to the various railroads from 45% to 50% of their gross receipts, as compensation for the services rendered by the railroad companies in transporting express matter, so that the operating revenues of the express companies, over and above the amounts paid the railroad companies, would vary from 45% to 55% of their gross receipts. The State Board of Assessment and Equalization, as will be shown, adopted the plan of disregarding everything excepting the amounts paid the railroad companies and made an assessment, in each instance, upon the express companies, based solely upon the amounts reported by the railroad companies as having been paid them for express service.

During the year ending April 30, 1910, and upon the 1st day of May, 1910, there were six express companies transacting business in South Dakota, viz., Wells Fargo & Company, United States Express Company, American Express Company, Great Northern Express Company, Western Express Company and Adams Express Company. It appears from the record that the reports of the various railroad companies transacting business in South Dakota made to the auditor of that state, disclosed the names of the express companies transacting business over the lines of each railroad and the amounts paid by the express companies to the railroad companies for express service, including both interstate and intrastate, in the state of South Dakota (*Record pp.* 3-25). It also appears that the amount received from each express company for express service was determined by dividing the total amount paid to each railroad company by the express company transacting business over its lines for express service over all the lines of railroad of such railroad company proportionately, not to the business transacted in each state, but to the mileage in the several states, and that the amounts returned by the railroad companies as having been paid for express service in the state of South Dakota, were not the amount paid by the express companies for the express service rendered by them in the state of South Dakota, but was the proportion of the total amounts paid for express service, over all of the lines of the railroads, which the mileage of the railroads in the state of South Dakota bore to the entire mileage of each of such railroad companies (*Record pp.* 22-23). It also appears from the testimony of John Hirning, State Auditor, and member of the State Board of Assessment and Equalization,

that the Board in making the assesment upon the express companies took into consideration the amounts paid the railroad companies by the express companies for express service. (*Record, pp.* 27-28).

It is the contention of appellee in this case, that, instead of making *ad valorem* assessments upon the property of the express companies transacting business in the state of South Dakota, the State Board of Assessment and Equalization purposely disregarded the statements made by the express companies of the property owned by them in the state of South Dakota on May 1, 1910, and made an assessment solely by reference to the amounts paid by the express companies to the railroads for express service, fixing such assessment at such amount, in the case of each express company, that a tax levy of 28 mills would realize a sum equal to .0448% upon the amounts paid to the railroad companies.

In the 1909 case, as appears from the opinion of Judge Willard, the State Board of Equalization made assessments, for the year 1909, upon the express companies transacting business in South Dakota, in such sums as that a levy of 25 mills would produce a tax equal in amount to 4% upon the amounts paid by the express companies to the railroad companies for express service in 1909. That this method of assessment and taxation was adopted by the State Board of 1909 was judicially determined by the decision of Judge Willard and the computations evidencing the fact appear in his opinion (*Appendix p.* 48).

The 1909 assessment was made in August of that year. The suit to enjoin the collection of that tax was brought in March, 1910, and while pending and undetermined the assessment for 1910 was made by the State Board of Assessment and Equalization in August, 1910. The decision of Judge Willard in the 1909 case was not rendered until a year later, or in July, 1911. At the time the 1910 assessment was made, the method adopted in 1909 had not been declared unconstitutional and the State Board of Assessment and Equalization followed the same method in making the 1910 assessments and tax levies.

The record disclosed the several amounts paid by five of the six express companies to the railroad companies for the carrying of express matter for the year ending April 30, 1910. The exact amount paid by the sixth company, the Adams Express Company, to the railroads is not specifically shown owing to the fact that the Chicago, Burlington & Quincy Railroad Company, which is one of the railroads over which the Adams Express Company transacted its express business, did not disclose in its reports the amount paid it for express service but included that amount with other items under the head of "Miscellaneous" receipts, other than receipts from passenger and freight service. For this reason we will treat of the assessments upon the other

five companies separately from the assessment upon the Adams Express Company. From the figures as contained in the record the following results are obtained:

Wells Fargo & Company:	
Amount paid railroads	$181,193.72
Multiply by	.0448
Result	$ 8,117.48
Assessment	289,877.00
Multiply by	.028
Result (tax)	$ 8,116.55
Difference between tax of .028% of assessed valuation and .0448% of amount paid railroads	.93
United States Express Company:	
Amount paid railroads	$ 6,812.22
Multiply by	.0448
Result	$ 305.18
Assessment	10,899.00
Multiply by	.028
Result (tax)	$ 305.17
Difference between tax of .028% of assessed valuation and .0448% of amount paid railroads	.01
American Express Company:	
Amount paid railroads	$120,689.56
Multiply by	.0448
Result	$ 5,406.89
Assessment	193,260.00
Multiply by	.028
Result (tax)	$ 5,411.28
Difference between tax of .028% of assessed valuation and .0448% of amount paid railroads	4.39
Western Express:	
Amount paid railroads	$ 1,507.28
Multiply by	.0448
Result	$ 67.52
Assessment	2,262.00
Multiply by	.028
Result (tax)	$ 63.34

Difference between tax of .028% of assessed valuation and .0448% of amount paid railroads	$	4.18
Great Northern Express Company:		
Amount paid railroads	$	6,626.47
Multiply by		.0448
Result	$	296.86
Assessment		11,278.00
Multiply by		.028
Result (tax)	$	315.78
Difference between tax of .028% of assessed valuation and .0448% of amount paid railroads	$	18.92

From the foregoing computation it will be seen that the tax levied upon five of the six express companies transacting business in South Dakota amounted substantially to an income tax of .048%.

In the case of Wells Fargo & Company, the express company having the largest mileage in South Dakota, the tax of 28 mills upon the assessed valuation is within ninety-three cents of .0448% of the amount paid the railroad companies by Wells Fargo & Company.

In the case of the American Express Company, which is the company having the next largest mileage in the state, the 28 mill tax levied upon the assessed valuation differs but $4.39 from .0448% upon the amount paid the railroad companies.

In the case of the United States Express Company, the tax of 28 mills levied upon the assessed valuation is but one cent less than .0448% of the amount paid the railroad companies, the real difference is even less than one cent, for if the 28 mill tax be correctly computed upon the assessed valuation it amounts to $305,172, which would leave a difference between the tax as assessed and .0448% of the amount paid the railroads of but eight mills.

The tax upon the Western Express Company of 28 mills upon the assessed valuation is but $4.18 less than .0448% of the amount paid the railroads.

The only one of the five companies in whose assessment there is more than a trifling difference between 28 mills of the assessed valuation and .0448% of the amount paid the railroads is the Great Northern Express Company, the tax upon which was $18.92 more than would have been a tax equal to .0448% of the amount paid the railroads. This difference, while more than that of the other four companies, is comparatively trifling and undoubtedly due to some error upon the part of the State Auditor in making the computations.

In the case of the Adams Express Company it is impossible to make a similar computation to those made in the cases of the other express companies due to the fact, as already pointed out, that the Chicago, Burlington & Quincy Railroad Company in its report included the amount paid by the express companies with other items of "miscellaneous" receipts other than those derived from passenger and freight earnings.

It appears also from the record that the State Board of Assessment and Equalization at the time it assessed the other express companies assessed the Adams Express Company in the sum of $71,632 and subsequently, upon the filing of a protest against this assessment, reduced it to the flat sum of $40,000 (*Record, p.* 25). The record shows that the Adams Express Company paid the Minnesota, Dakota & Pacific Railroad Company for express service $12,219.73 and paid the Minneapolis & St. Louis Railroad Company $4,445.60 and that the Chicago, Burlington & Quincy Railroad Company reported that it received from miscellaneous sources, including the amount paid it for express service, $68,409.96 (*Record, pp.* 24-25). There was nothing before the State Board of Assessment and Equalization to show how much the Adams Express Company paid the Chicago, Burlington & Quincy for express service and the board in making the assessment seems, in the first instance, to have made an assessment based upon the assumption that 50% of the $68,409.96 reported by the Chicago, Burlington & Quincy as received from miscellaneous sources was paid by the Adams Express Company and then, upon protest being made by the express company, to have reduced the assessment to the arbitrary sum of $40,000.

Of the six express companies transacting business in South Dakota in 1910, practically nine-tenths of the mileage was owned and operated by Wells Fargo & Company and the American Express Company. Upon Wells Fargo & Company the tax levied was but ninety-three cents less than an income tax based upon the amount paid the railroad companies, and in the case of the American Express Company the tax was but $4.39 more than would have been an income tax confessedly based upon the railroad payments. In other words, the combined tax upon the two express companies transacting nine-tenths of the express business in South Dakota differed but $3.46 from an income tax based upon the railroad payments.

In the case of the United States Express Company the difference between the tax assessed and an income tax is but one cent or, to be perfectly exact, but eight mills, and in the case of the Western Company the difference is but $4.18.

District Judge Elliott, in his very elaborate opinion in this case, took the position that because the mathematical demonstration did not figure out to the exact cent, the demonstration

failed. We submit that this is, under the circumstances of this case, altogether too strict and technical an interpretation of the evidence. It has been judicially determined that the 1909 assessment was made by the State Board of Assessment and Equalization upon a gross earnings basis. The 1910 assessment was made by a State Board of Assessment and Equalization composed of the same members as in 1909 and the assessment was made while the 1909 suit was pending and long before it had been decided by Judge Willard. Is it not natural to suppose that the members of the State Board of Assessment and Equalization proceeded in making the 1910 assessment upon the same methods used in making the 1909 assessment? Under all the circumstances the conclusion of Judge Elliott, that "the Board did its duty," is not the construction which the average man would put upon the action of the State Board of Assessment and Equalization after it had been judicially determined that the 1909 tax was made upon a gross earnings basis.

The report made by appellee to the State Auditor of its business for the year ending April 30, 1910, showed the total value of its property in South Dakota to be $18,473.98 (*Record, p.* 5). The testimony of Grover B. Simpson, General Superintendent of appellant, was that appellee, on May 1, 1910, had no property within the state of South Dakota other than as set forth in its statement to the State Auditor and that the value of said property as stated in said report was the full and true value in money of said property at all times during the year ending April 30, 1910, and upon the 1st day of May, 1910. This evidence is uncontradicted excepting by the vague statement of the witness, John Hirning, the State Auditor, to the effect that appellee had other property, the character, amount and value of which is nowhere disclosed (*Record, p.* 27). Hirning also testified that he and the other members of the State Board of Assessment and Equalization considered the reports of the railway companies doing business in South Dakota, the reports and records of the Board of Railroad Commissioners, the contracts for express privileges of appellee in South Dakota, the earnings of appellee in the state and the business transacted by it, and the amount of money "which in the judgment of the witness "and the other members of the Board must have been necessary "to carry on the various lines of the said company's business "in this state." (*Record, p.* 27). In other words, it appears from the testimony introduced upon the part of the appellee that the members of the State Board of Assessment and Equalization, in making the assessment upon the property of appellee, did pretty nearly everything excepting the one thing which under the constitution and laws of South Dakota they ought to have done. It was the duty of the members of the Board to make an *ad valorem* assessment which should be uni-

form and equal so that appellee should pay a tax equivalent to that paid by every other person and corporation in the state "in proportion to the value of his, her or its property," and this tax must be assessed and levied upon appellee "as near as may by the same methods as are provided for the assessing and levying of taxes on individual property." According to the testimony of one of its own members the Board took into consideration, not merely the value of the property owned by appellee in South Dakota, but the reports made by the railroad companies of the moneys paid them for express service, the contracts between the railroad compaines and the business transacted by them and the amount of money which "in the judgment of the witness and the other members of the Board must have been necessary to carry on the various lines of said company's business in this state." It is difficult to imagine a more complete confession of a most flagrant violation of all constitutional and statutory provisions by a board of officials entrusted with the duty of making a uniform and equal assessment upon the property of individuals and corporations within the state.

It will be observed in passing, that there is no question involved in this case of any assessment upon the so-called "unit" system such as was sustained by the supreme court in *Adams Express Company v. Ohio,* 165 U. S. 194. There is no statute in South Dakota drawn upon the lines of the "Nichols" law of Ohio providing for an assessment of the property of express companies upon the unit system, and consequently the assessment made upon the property of appellee for the year 1910 cannot be defended upon the strength of the doctrine laid down by the supreme court in *Adams Express Company v. Ohio* and the line of decisions following that case.

We submit that the evidence in this case all tends to show conclusively that the State Board of Assessment and Equalization, instead of making as assessment as required by the constitution and laws of South Dakota upon the property holdings of appellee within the state, made a forced assessment based solely upon the income of appellee as shown by the amount paid by it to the railroad companies for express service. The mathematical demonstration of this fact is fully as conclusive as was the demonstration in the 1909 case, for the very slight difference in the computations between a tax of 28 mills upon the assessed valuation and .0448% upon the amounts paid the railroad companies is negligible and can easily be accounted for by the disregard of odd cents in making the computations. Indeed it would have been remarkable had some slight discrepancy not existed. It will also be noticed, that although in the 1909 case it was found by Judge Willard that the assessment had been made in such manner as to produce a tax equivalent to an income tax, and although the bill alleged that a similar

method had been pursued in making the 1910 assessment and the figures demonstrated the truth of these allegations, there was no attempt made, either in the answers or in the evidence interposed upon the trial, to explain why the assessment made upon five of the six express companies produced a tax practically equivalent in each instance to a fixed percentage upon the payments to the railroad companies, and nowhere in the pleadings or in the evidence was any attempt made to demonstrate that the assessment was made in any manner other than in such a form as would result in a tax equivalent to a tax upon the income as represented by the railroad payments. If the State Board of Assessment and Equalization had adopted any other method of making the assessment it would have been a very easy matter for the members of the Board to have disclosed the computations made by them in assessing the various express companies, and, under all of the evidence in the case, we submit that the burden of proof shifted from the plaintiff to the defendant after the relation between the assessment and the railroad payment had been disclosed by mathematical computations.

We submit that this is not merely a case of "excessive valuation" in which the courts will not interfere with the action of the assessing board. The evidence discloses that the State Board of Assessment and Equalization proceeded upon a false theory of the law and of its own powers and went beyond anything which Chapter 64, Laws of 1907, could, by the most liberal interpretation, have contemplated. The conclusion reached by the Board shows a result enormously in excess of that warranted by any of the factors which they were at liberty to use in their calculations and that circumstance is proof of such misconduct on the part of the Board as to deprive its action of any weight whatever. This precise question was decided by the Supreme Court of Minnesota in *State v. New London and N. A. Mortgage Company,* 80 Minn. 277. In that case the defendant was assessed in the sum of $1,000,000. It appeared before the Board and denied that it had any property subject to taxation. By the evidence taken in the suit it appeared that the true value of the property in St. Paul, which the assessor had estimated at $1,000,000, was but $62,000. The Supreme Court of Minnesota said:

"We have no doubt that such excessive valuation in viola-
"tion of reason, justice and common sense would convict the
"assessment of such lack of the element of judgment as to re-
"quire interference by the judicial power to correct it."

In the case at bar, it appears from the record that the value of the property belonging to appellee was but $18,473.98 but the Board made an assessment of $289,877 and upon it levied a tax of $8,116.56 or 40% of the value of the entire property owned by appellee in the state of South Dakota. Such assessment was,

we submit, in the language of the Supreme Court of Minnesota, "in violation of reason, justice and common sense."

The imposing upon appellee of an arbitrary assessment and of an arbitrary tax, which can be justified by no provision of law, and which is "in violation of reason, justice and common sense" would seem to constitute the taking of property "without due process of law" in violation of the provisions of both the federal constitution and of the constitution of the State of South Dakota.

TWELFTH POINT.

The question now presents itself as to whether the assessment and tax in controversy in this case does not constitute a tax upon interstate commerce and, as such, obnoxious to the commerce clause of the federal constitution.

Upon the trial, the appellant introduced in evidence the testimony of John Hirning, a former State Auditor of the state of South Dakota and a member of the State Board of Assessment and Equalization in the year 1910. This testimony was objected to by appellee upon the ground that the witness, as a member of the State Board of Assessment and Equalization was not competent to testify as to the acts of the Board or as to the motives and influences that prompted it in making its assessment. This objection was made under the authority of *Chicago, Burlington & Quincy Railroad Company v. Babcock*, 204 U. S. 485, but the court received the evidence "subject to the objection" (*Record, p.* 26). While we contend that this evidence was incompetent it was introduced into the record over our objection, and the appellee is entitled to the benefit of it. It appears from this evidence that in making the assessment for the year 1910 the Board considered the reports and statements of the railroad companies doing business in South Dakota (*Record p.* 27). These reports showed that there had been paid to the railroads by the several express companies transacting business in the state of South Dakota various sums of money (*Record, pp.* 23-25). These were the gross amounts paid by the express companies to the railroad companies and represented the payments made for the entire South Dakota business, both interstate and intrastate, and were made by the railroad companies by computing the entire amount paid by each express company for express services rendered over each entire railroad system and then the amount paid for express service in South Dakota determined by pro rating to the South Dakota business such proportionate amount of the entire payment to the railroad company as the mileage in South Dakota might bear to the entire mileage of the railroad system over which the express company transacted business (*Record, pp.* 22-23). From the mathematical demonstration heretofore made it appears that

the taxes levied by the State Board of Assessment and Equalization upon the express companies amounted to a gross earnings tax upon the entire business of the express companies as shown by the reports of the railroad companies, which reports included the interstate as well as the inrastate earnings. That such a tax is invalid is determined by a long line of decisions of this court, one of the most recent of which is *Galveston, Harrisburg, etc., Railroad Company vs. Texas*, 209 U. S. 278. There is nothing in the record in this case to bring it within the line of the cases in which taxes levied upon assessments made by taking gross earnings as a measure of the value of property have been sustained by this court. *United States Express Company vs. Minnesota*, 223 U. S. 335. Under the Constitution of the State of South Dakota there existed no authority for the State Board of Assessment and Equalization to measure the value of the property of the express companies by their gross receipts, and the record shows that the amount of the taxes is "unduly great, having reference to the real value of the property of the company within the State," and that it amounts to more than the ordinary tax upon property in South Dakota. In no particular does the tax in controversy in this suit stand upon a footing comparable to that of any tax which has ever been sustained by this court in the making of which receipts from Interstate Commerce have been taken into consideration.

THIRTEENTH POINT.

Counsel for appellant lay great stress upon the decision of this Court in *United States Express Company vs. Minnesota*, 223 U. S. 335. That case is not in any manner controlling in the case at bar, for the reason that in Minnesota, by Section 17 of Article 9 of the State Constitution, as amended November 3, 1896, the legislature was expressly authorized to impose upon express companies gross earnings taxes. *United State Express Company vs. Minnesota* came to this Court by writ of error to the Supreme Court of Minnesota. In the latter Court, the case appears as *State vs. United States Express Company*, 114 Minn. 346, and the Minnesota Supreme Court, in the opinion, expressly says: "A constitutional amendment passed in 1896 (Const. Art. IX, §17) "authorized a gross earnings tax upon express "companies." In the opinion in this Court it is said: "The "Supreme Court of Minnesota construed the tax to be a prop-"erty tax, measured by the gross earnings within the State, "which, under their construction of the tax, included the earn-"ings here in question. That Court held that the statute was "part of a system long in force in Minnesota, passed under the "authority of the State Constitution, and was intended to af-"ford a means of valuing the property of express companies "within the State."

Had the Constitution of South Dakota expressly authorized a gross earnings tax, this case might not now be before this Court. The difference in the constitutional provisions of South Dakota and of Minnesota is what clearly differentiates the case at bar from *United States Express Company vs. Minnesota,* and that case is in no manner a controlling authority in a case involving the construction of the revenue provisions of the South Dakota constitution.

On page 6 of the brief of counsel for appellant, they cite §3224 of the Revised Statutes of the United States, that "No "suit for the purpose of restraining the assessment or collection "of any taxes shall be maintained in any Court," and upon pages 36 *et seq.*, of their brief, counsel argue that this section should be construed to apply to state as well as to Federal taxes. It requires, we believe, but the statement of this position to show that it is untenable. §3224 refers to Federal taxes, and can have no bearing whatever upon states taxes.

Counsel further contend that this is not a case in which the rules of equity would permit an injunction to issue. This contention does not require serious attention. It was fully disposed of by Judge Sanborn in his opinion in the Circuit Court of Appeals, in the following language:

"Finally counsel for the defendant argue, as we understand "their brief, that although the law under which the assessments "were made is unconstitutional and the assessments and taxes "are void still the plaintiffs are entitled to no injunction against "their collection, (1) because they failed to state in their re-"ports to the board the value of all their property in the "state or used in the "state as required by Subdivision 5 of Sec-"tion 16 of Chapter 64 of the Laws of South Dakota of 1907; "but their failure so to do, if they so failed, and there is positive "and persuasive testimony in the record that they did not, is "not such iniquity as repels a plaintiff from the precincts of a "court of equity, (2) because neither mere illegality, nor irreg-"ularity, nor injustice sufficient to sustain an injunction to re-"strain the collection of a tax; but these taxes are not irregular, "or illegal, or unjust only. The record has convinced that they "are unjust and excessive, that they are irregular and unlaw-"ful, but they are also unconstitutional and void, and their col-"lection would constitute a taking of the property of the plaint-"iffs without due process of law in violatio nof the national "constitution, and the action of the board in making the assess-"ments and levying the taxes was either a gross mistake equiva-"lent to a fraud or an actual fraud, and mistake and fraud are "immoral grounds of equity jurisdiction, (3) because the plaint-"iffs have an adequate remedy at law; but this is the second time "this board has made in the same way unlawful assessments of "the property of these plaintiffs which effect an unjust and

"unconstitutioanl discrimination in taxation against them and "their property. Its action has been systematic and repeated "and a systematic, repeated continuing violation of the con- "stitution or the law to the injury of a plaintiff like a continu- "ing trespass, presents ample reason for an injunction against its continuance. *Atchison, Topeka & Santa Fe Ry. Co. v. Sull- "ivan*, 173, Fed. 456, 471; *Cummings v. National Bank*, 101 U. "S. 153, 158; *Raymond v. Chicago Traction Company*, 207 U. S. "20, 36, 37; *Railroad and Telephone Companies v. State Board "of Equalizers* (C. C.) 85 Fed. 302, 307, 318; *Fargo v. Hart*, 193 "U. S. 490, 503; *Regan v. Farmer's Loan & Trust Company*, "154 U. S. 362, 391; *Nashville, C. & St. L. Ry. v. Taylor* (C. C.) "86 Fed. 168, 184; *Louisville Trust Company v. Stone*, 107 Fed. "305, 46 C. C. A. 299 (4) because the plaintiffs have an ade- "quate remedy at law; but the plaintiffs now have and are "entitled, as against these unconstitutional taxes, to the right "to keep the amount required to pay them. The rights of the "parties have been litigated and determined. The only remedy "at law the plaintiffs have is either to defend against a pro- "ceeding to collect the taxes on the same grounds which have "been presented and sustained in these suits, or to pay the "amounts of these taxes under protest and bring actions at law "to recover them back. Neither of these remedies is as prompt, "as certain, or as complete as the immediate decree of this court "and its unjunction to which the plaintiffs have established "their right in this litigation."

It may also be taken into consideration that the situation in South Dakota was even stronger than it was assumed to be by Judge Sanborn in his opinion, for the reason, that until the session of the South Dakota Legislature held in the present calendar year, there existed no statute in that State authorizing or permitting the payment of taxes under protest, so that, at the date of the assessment and levy of the taxes in controversy in this case, there was no method provided by law in South Dakota for the payment of taxes under protest.

We would also add that the bill in this case was drawn upon the model of the bill filed in *Fargo vs. Hart*, 193 U. S. 490, which was approved by this Court, and that it contains all of the jurisdictional and other allegations necessary to bring this case strictly within the rule laid down in *Fargo vs. Hart*.

FOURTEENTH POINT.

At the general election held in the State of South Dakota in November, 1912, an amendment proposed by the legislature at its session in 1911, amending Section 2 of Article XI of the state constitution, was adopted. This amendment has been in force since December, 1912, and, as amended, Section 2 reads as follows:

"All taxes shall be uniform on all property and shall be "levied and collected for public purposes only. The value of "each subject of taxation shall be so fixed in money that every "person and corporation shall pay a tax in proportion to the "value of his, her or its property. Franchises and licenses to "do business in the state, gross earnings and net income, shall "be considered in taxing corporations and the power to tax "corporate property shall not be surrendered or suspended by "any contract or grant to which the state shall be a party. The "legislature shall provide by general law for the assessing and "levying of taxes on all corporate property, as near as may be "by the same methods as are provided for assessing and levying "of taxes on individual property."

As this constitutional amendment was adopted long subsequent to the making of the assessment and tax levy involved in this suit and long subsequent to the institution of this suit, its provisions do not apply to the assessment and tax in controversy. Our contention, however, is, that even had this constitutional amendment been in effect at the time of the making of the assesment and tax in this suit, the proceedings of the State Board of Assessment and Equalization would have been equally as obnoxious to the South Dakota constitution as amended as they are to the constitution as it existed at the time of the making of the assessment and tax levy.

While a consideration of the effect of the revenue amendment to the South Dakota constitution adopted in 1912 is immaterial to the disposition to be made of this suit, we desire to place ourselves upon record as taking the position that an assessment and tax of the character involved in this suit would be illegal even under the amended South Dakota constitution. We do this in view of the fact that there are pending in the District Court of South Dakota, and in the state courts of that state, other cases involving a consideration of the revenue sections of the South Dakota constitution as amended in 1912 and we desire not to be precluded by the decision which may be made in this case from raising, in future cases which may come before this court, questions involving the constitutionality and validity of assessments made and taxes levied after the amendment of 1912 to the South Dakota constitution went into effect.

IN CONCLUSION.

In this suit we contend that the decision of the Circuit Court of Appeals should be affirmed for the following reasons:

FIRST: Chapter 64, Laws of South Dakota, 1907, the statute under which the assessment and tax in this case was made, is unconstitutional and in violation of the revenue provisions of the South Dakota state constitution.

SECOND: The proceedings of the State Board of Assessment

and Equalization of the State of South Dakota in making the assessment and levying the tax upon Wells Fargo & Company, the appellee herein, for the year 1910, were in excess of the authority posessed by that Board and amount to the taking of property, without due process of law, in violation of the provisions of the constitution of the State of South Dakota and of the federal constitution.

THIRD: The tax levied by the State Board of Assessment and Equalization of the State of South Dakota upon Wells Fargo & Company, the appellee herein, for the year 1910 constitutes a tax upon interstate commerce and is, conseqeuntly, in violation of the commerce clause of the federal constitution.

Respectfully submitted,

C. O. BAILEY and J. H. VOORHEES,
Solicitors for Appellee.

CHARLES W. STOCKTON,
Of Counsel for Appellee.

APPENDIX—PART I.

PROVISIONS OF THE SOUTH DAKOTA STATE CONSTITUTION IN FORCE IN YEARS 1909, 1910 AND 1911

ARTICLE III.

§ 21. No law shall embrace more than one subject, which shall be expressed in its title.

ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

§ 17. No tax or duty shall be imposed without the consent of the people or their representatives in the legislature, and all taxation shall be equal and uniform.

§ 18. No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

ARTICLE XI.

§ 2. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property.

§ 5. The property of the United States and of the state, county and municipal corporations, both real and personal, shall be exempt from taxation.

§ 6. The legislature shall, by general law, exempt from taxation property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation.

§ 7. All laws exempting property from taxation, other than that enumerated in sections 5 and 6 of this article, shall be void.

APPENDIX—PART II.

SECTION 2 OF ARTICLE XI OF SOUTH DAKOTA STATE CONSTITUTION AS AMENDED AT ELECTION HELD IN NOVEMBER, 1912, AND IN FORCE SINCE DECEMBER, 1912.

§ 2. All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Franchises and licenses to do business in the state, gross earnings and net income, shall be considered in taxing corporations and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be by the same methods as are provided for assessing and levying of taxes on individual property.

APPENDIX—PART III.

CHAPTER 64 LAWS OF SOUTH DAKOTA 1907 AS AMENDED BY CHAPTER 162 LAWS OF 1909 AND AS IN FORCE FROM MARCH 4, 1909, TO END OF 1910.

An Act Providing for the Assessment and Taxation of the Property of Railway, Telegraph, Telephone, Express and Sleeping Car Companies.

Be it Enacted by the Legislature of the State of South Dakota:

§ 1. All property real and personal, belonging to any railroad company in this state, and necessarily used in the operation of its line or lines of railway in this state, shall be assessed for the purposes of taxation by the state board of assessment and equalization and not otherwise; and in making said assessment the said board shall among other things, take into consideration the value to said railway company of its franchises, rights and privileges granted under the laws of this state, to do business as a common carrier in this state; and for the purpose of aiding said state board of assessment in making said assessment, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each railway company in this state and to make an estimate of said value and to make and file with the state auditor on or before the first day of June each year a written and detailed report of such information, facts and estimate. In said report the board of railway commissioners shall make a separate estimate of the value of that part of the railroad property, including terminals, depots, warehouse lots, sidings,

passing tracks, switches, roundhouses, shops, yards, grounds and other structures which are situated within the limits of an incorporated city or town. Nothing in this act shall be so construed as to prevent the local assessment and the taxation of all property of such railway company, both real and personal, as is not actually and necessarily used in the operation and maintenance of its lines of railway.

§ 2. It shall be the duty of the president, secretary, or other accounting officer thereto duly authorized, of any railroad company owning, leasing or operating any railroad within this state, to furnish the state board of assessment and equalization on or before the first day of June of each year, a statement signed and sworn to by such officers, embracing and showing for the year ending April 30th preceding:

First. The whole number of miles of main line or lines and branches thereof owned, operated or leased in the state by the railroad company making the return, and the value thereof per mile.

Second. The number of miles of main line or lines and branches thereof owned, operated or leased by such company and the number of miles of side track and the value thereof per mile, the quantity of lands used for gravel or sand beds or for snow protection and the number and character of buildings and value thereof and width of right of way and width and length of warehouse lots, located in each county in the state.

Third. The number of miles of main line; and the number of miles of side tracks and passing tracks and value thereof, the width and length of right of way, the number and size of warehouse lots upon or contiguous to the right of way, the size, cost, and character of the passenger depot, freight depot, warehouse or warehouses, shops, turntables, roundhouses, engine stables, coal houses, stock yards and of all other buildings, the amount of ground used for yards in addition to ground already specified, and the quantity of unplatted land held or used exclusively for railway purposes, owned by said company and situated within the incorporated limits of each city or town, and the value thereof, and of any terminals therein owned by said company.

Fourth. The number of engines, passenger, mail, express, baggage, freight and other cars owned by said company and used in operating such railroad in this state; and on roads having various lines and branches within the state, the statement shall show the actual amount of rolling stock owned by said company, in use on each of said lines and branches within this state during the year for which the report is made.

Fifth. The total gross earnings of the company for the year for which the report is made, the amount paid out for operating

expenses, for taxes, for interest on bonds, and for permanent improvements.

Sixth. The total net earnings of the company for the year for which the report is made, and the total number of miles owned and operated.

Seventh. The total gross earnings of the various lines and branches owned and operated by said company within this state during the year for which the report is made, the amount paid out of the same for operating expenses incurred in operating such lines and branches, the total amount paid out for taxes upon said property within the state, and the amount paid out for interest on bonds issued upon the lines and branches in the state, the amount of such bonds per mile and the interest which they bear, and the amount paid out for permanent improvements upon the lines and branches within the state during said year.

Eighth. The per centum paid to the stockholders of said company during said year as dividends, upon both common and preferred stock, and the surplus representing undivided profits on hand at the time of making said statement.

§ 3. The valuation and assessment of the property of railroads by the said board of assessment and equalization shall be made as of the first day of May and shall be in the same ratio as that of the property of individuals, and such assessment shall be made upon the main line or lines, and branches thereof within the state separately, and shall include the right of way, road bed, bridges, culverts, rolling stock, depots, yards, shops, buildings, gravel or sand beds, lands for snow protection, and all other property, real and personal, used in and employed about and incidental to the operation and maintenance of such railroads and branches thereof. In assessing a railroad and its equipment and property, the said state board of assessment and equalization shall consider the earning power of the property as shown by its gross and net earnings, the value of the franchise or other privileges granted by the state under which it has the right of eminent domain and the right to do business within the state, and any and all other matters necessary to enable them to make a just and equitable assessment of the value of such property per mile in each county through which said railroad passes. Said board shall determine and fix separately the aggregate value of the property described in subdivision three of section two of this act, which is located within the corporate limits of any city or town.

§ 4. The state board of assessment and equalization shall transmit to the board of county commissioners of each county, through which any such railroad runs, a statement showing the

length of main track, of main line or lines, and the branches thereof within such county not located within the corporate limits of any city or town, and the assessed value per mile of said main line or lines, and branches as fixed by a pro rata distribution per mile of the asssesed value of the whole property, except that part located within the corporate limits of cities or towns, as aforesaid, and said statement shall be entered upon the proper records of said several counties. Said board shall also transmit to the mayor and city council of each city and the board of trustees of each incorporated town through, or into which any such railroad extends, a statement showing the total assessed valuation fixed by said board upon that part of said railroad property described in subdivision three of section two of this act which is located within the corporate limits of such city or town and said statement shall be entered upon the proper records of said city or town and a transcript thereof transmitted to the county auditor of the county in which such city or town is located, to be by him listed for taxation the same as other property within such city or town assessed by the assessor thereof.

§ 5. It shall be the duty of the board of county commissioners of all counties receiving such statements from the state board of assessment and equalization, at their first meeting after receiving such statement, to make and enter in the proper records, an order stating and declaring the length of the main track of road and branches and assessed value of such road and branches lying within each township, and lesser taxing district in their counties respectively, through or into which said road or branches thereof run, as fixed by the rate of assessment per mile as made by the state board of assessment and equalization, and when received, shall also enter in the proper records, the assessments made by said board of the ra'lroad property in such county located within the limits of each city or town transmitted to the mayor and city council or board of trustees thereof, and the amounts so entered of record shall constitute the taxable value of said property for all taxable purposes, and shall transmit a copy of such orders and records to the city council or trustees of each city or incorporated town or township and the proper officer of each lesser taxing district, and also to said railway company.

§ 6. All such railroad property so assessed by said state board of assessment and equalization shall be taxable upon said assessment at the same rates and for the same purposes as the property of individuals within such counties, cities, incorporated towns, townships and lesser taxing districts. The proper officer of each taxing district shall certify to the county

auditor the several rates of taxes to be levied in said district, and the said county auditor shall extend the taxes against said assessment in a book to be called the "Railroad Tax Book," and shall transmit a copy of the rates so extended to each railroad company.

§ 7. The county auditor shall make and deliver a duplicate of said railroad tax book to the county treasurer and the county treasurer shall be charged with the collection of said railroad taxes in the same manner and under the same provisions and restrictions that are imposed upon such treasurer in the collection of the taxes of individuals; and the amount due each city, incorporated town, township or lesser taxing district shall be paid over when collected by the county treasurer to such city, or town, township or lesser taxing district.

§ 8. All laws in force relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this act and whenever any taxes levied under the provisions of this act shall become delinquent, the county treasurer having control of such delinquent taxes, shall proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any other rolling stock for collection of said taxes.

§ 9. Every railroad company shall file with the county auditor of each county through or into which its line or lines of railroad run, a map, showing the right of way, depot grounds, yard room, gravel or sand beds, and lands for snow protection, and lands otherwise used by it in the maintenance and operation of its railway at the date of filing such map, showing lots or parts of lots and blocks in cities and towns and the number of acres in each government subdivision and it shall be the duty of the county auditor to provide for the exception from assessment by the local assessor all such right of way, depot grounds, yard room, gravel or sand beds and lands for snow protection, or lands otherwise used in the operation and maintenance of its railway. It shall be the duty of the county register of deeds to notify the county auditor of any deed to any railway company for the right of way, depot grounds, yard room, gravel or sand beds, or lands for snow protection, that may be filed in his office for record so that the same may be entered by such county auditor on said map for the purpose above mentioned.

§ 10. In case the proper officer of any railroad company shall fail to make the statement under oath herein named, the state board of assessment and equalization shall add twenty-five per cent to the assessable value of the property of such company.

For the purpose of collecting the information and facts, and

to enable them to arrive at a correct estimate of the value of railroad property in this state for their own use in making maximum passenger and freight schedules, and for the use of the state board of assessment and equalization in assessing the value of said property for purposes of taxation, the board of railway commissioners are hereby authorized to employ a competent expert to assist them in making such investigation.

§ 11. It shall be the duty of the president, secretary, general manager or superintendent of every telegraph or telephone company doing business in this state, to furnish to the state auditor on the first day of July of each year, a statement under oath in such form as the auditor may prescribe showing the following facts:

First. The total number of miles owned, operated, or leased within the state by such company, together with the number of separate wires thereon, the kind of metal used for such wires, the kind and dimensions of the poles used, (and the distance the same are set apart from each other,) the average cost of building and equipping said line per mile, and stating the counties through or into which the same extend, or in which such company does business.

Second. The number of miles in each county and the number of stations and exchanges belonging to the company and location therein together with the number of telegraph or telephone instruments used in such county.

Third. The average number of poles per mile used in constructing said lines; and a telephone company shall also give the number and names of cities and towns in which such company maintains local telephone exchanges, under an ordinance granted by a city or town, and the value of the entire plant, including all wires, poles, instruments, office furniture and apparatus, franchises and equipment considered as one property in operation.

Fourth. The number of offices maintained by the company in this state and the total gross and net receipts of all said offices for the year ending April 30th preceding the making of said statement; the amount paid out for operating expenses, for taxes, for interest on bonds and for permanent improvements.

Fifth. The per centum paid to stockholders of said company during said year as dividends upon both common and preferred stock and the surplus on hand representing undivided profits at the time of making said statement; the total bonded debt and rate of interest and the total capitalization of the company.

Such statement shall be made according to such forms and instructions as may be prescribed by the state auditor and with reference to lines owned and operated on the first day of May

of the year for which the return is made.

§ 12. For the purpose of aiding the state board of assessment and equalization in making an assessment of the property of telegraph and telephone companies, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each telegraph and telephone company in this state, including the value of its franchises, and to make an estimate of the value thereof and to make and file with the state auditor on or before the first day of July each year, a written and detailed report of such facts, information and estimate, and for the purpose of securing facts and information said board is hereby authorized to inspect the books and records and property of said companies and employ an expert when deemed necessary.

§ 13. In case any telegraph or telephone company refuses to make the statement herein required under oath and at the time specified, the state board of assessment and equalization shall add twenty-five per cent to the assessable value of the property of such company. The board of assessment and equalization shall consider all the statements, facts, information and estimates filed as aforesaid, and any other information obtainable concerning the value of the property of said companies and may add any property omitted therefrom, and shall proceed to assess said property and determine its value, including the value of its franchises, which shall be made as of the first day of May and shall be in the same ratio as that of the property of individuals.

§ 14. Said board after assessing the value of said property, shall proceed to levy a tax thereon, which shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied.

Each telegraph or telephone company so assessed shall, on or before the first day of March in each year, pay to the state treasurer the amount of tax so levied on its property, which shall be in lieu of all other taxes. If any telegraph or telephone company shall fail to make and file said statement each year as herein provided, or shall file a false statement, it shall forfeit to the state not less than five hundred dollars nor more than five thousand dollars to be recovered in the name of the state in any court of competent jurisdiction.

The state board of assessment and equalization shall cause a statement to be transmitted to the county auditor of each county in which any lines or office or other property of any telegraph or telephone company is situated showing the amount or

proportion of such property and value thereof situated in such county and also showing the amount or proportion of such property and the value thereof situated within the corporate limits of any city or town in said county and the state treasurer shall remit to the treasurer of each such counties their proportionate share of such tax and the said county treasurer shall turn over to each city or town the amount of said tax due such city or town as shown by the statement of the state board of assessment and equalization and shall apportion and distribute the remainder of said fund among the various county, school, road and other local tax funds pro rata according to the levy for such purposes made in the preceding year.

§ 15. The state board of assessment and equalization shall assess all property of said railroad companies in the manner aforesaid on the 3rd Monday in July of each year, and all the property of telegraph and telephone companies in the manner aforesaid on the 4th Monday of July each year.

§ 16. Every express company and every sleeping car company doing business in this state must transmit to the auditor of the state a statement of its business done within this state for the year ending on the thirtieth day of April preceding, which statement must be furnished on or before the first day of July of each year and shall contain the following items:

First. The total number of employees engaged by such company within the state, and the number thereof in each county.

Second. The total number of offices maintained by it within the state, and the number thereof in each county; the value of all office furniture, fixtures and real estate owned by it within this state.

Third. The number of miles of railroad over which such express or sleeping car company conducts its business within the state, and the number of miles thereof in each county.

Fourth. The total number of express cars or sleeping coaches owned by such company, and used within the state, and the number of such express or sleeping cars leased and controlled, but not owned by such company, and used within this state, or operated under lease or contract in any manner.

Fifth. The gross earnings of the total business of such company transacted within this state for the year ending April 30th preceding, and the value of all the property of such company used in this state.

§ 17. If the statement aforesaid shall not be received by the said auditor by the first day of August of each year, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for the purpose of aiding the state board of

assessment and equalization in assessing the value of the property of such companies, it is hereby made the duty of the board of railway commissioners to collect information and facts concerning the value of the property of each express and sleeping car company in this state and to make an estimate of said value and to make and file with the state auditor on or before the first day of July of each year a written and detailed report of such information, facts and estimate.

The state board of assessment and equalization shall, on the first Monday of July each year assess all the property of every express and sleeping car company doing business in this state and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state for the year ending on the thirtieth day of April preceding the statements made by said companies and by the board of railway commissioners and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals. All the statements aforesaid and information received shall be laid before the board of assessment and equalization which board shall review said statement or information and may change the valuation given or add to said statement any property omitted therefrom, and said board shall levy a tax upon said property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge, and other local taxes levied upon other property for the preceding year, and the auditor shall notify each company of the amount of taxes so levied.

§ 18. The statement of said companies required by this act shall be made according to such forms and instructions as may be prescribed by the state auditor and with reference to property owned on the first day of May of the year for which the return is made. If any express or sleeping car company aforesaid shall fail to make said statement, it shall forfeit to the state not less than five hundred dollars nor more than five thousand dollars to be recovered in the name of the state in any court of competent jurisdiction.

§ 19. Each express and sleeping car company so assessed shall on or before the first day of March of each year, pay to the state treasurer, the amount of tax levied on its property for the year preceding, which shall be in lieu of all other taxes.

§ 20. The state treasurer shall apportion the amount of taxes received under the provisions of this act between the state and the various counties in which such company is doing business, as herein provided.

The amount to which each is entitled shall be determined by

the state board of assessment and equalization and the county treasurer shall distribute the portion received by his county to the various county and local funds according to the levies made upon other property for the preceding year.

§ 21. In case any telegraph, express, telephone, and sleeping car companies doing business in this state shall fail or neglect to pay the tax due from it to the state for a period of thirty days after the same shall have become due, there shall be added to such tax a penalty of twelve per cent per annum.

§ 22. At any time after the expiration of thirty days from the time any such tax has become due and payable, the state treasurer shall distrain sufficient property of the delinquent to pay the same together with said penalty and the cost of distraint, and sale, and shall immediately advertise the sale of the same in at least three newspapers published in the state, stating the time, when, and place where such property shall be sold, and four weeks' notice of the time and place of such sale shall be given.

Such sale shall take place at some point in this state, and the proceeds thereof shall be applied to the payment of such tax, penalty and cost.

§ 23. The state board of assessment and equalization shall give at least ten days' notice of the time and place of its meeting, provided for in this article, to the officer of any railroad, telegraph or telephone company or other corporation making a return of the property of their company to the said board for the purpose of assessment and taxation, of every increase made by said board on the valuation of any of the property returned as aforesaid, for the purposes aforesaid, or of any addition made to said returns, and said companies shall have the right to appear and be heard, before said board in all matters relating to the assessment of the property of said company.

§ 24. All acts and parts of acts in conflict with this act are hereby repealed.

§ 25. There being serious defects in the assessment laws in relation to the assessment of the property of railway, telegraph, telephone, express and sleeping car companies, an emergency is hereby declared to exist and this act shall be in force from and after its passage and approval.

Approved March 7, 1907.

APPENDIX—PART IV.

RE-ENACTMENT OF CHAPTER 64 LAWS OF 1907 BY CHAPTER 347 LAWS 1913.

An Act Entitled, An Act Re-Enacting as a Law of this State Chapter 64 of the Session Laws of the State of South Dakota

for the Year 1907 As Amended by Chapter 162 of the Session Laws of the State of South Dakota for the Year 1909, and by Chapter 248 of the Session Laws of the State of South Dakota for the Year 1911, all Relating to the Assessment and Taxation of the Property of Railway, Telegraph, Telephone, Express and Sleeping Car Companies.

Be it Enacted by the Legislature of the State of South Dakota:

§ 1. That Chapter 64 of the Session Laws of the State of South Dakota for 1907 as amended by Chapter 162 of the Session Laws of the State of South Dakota for the year 1909 and by Chapter 248 of the Session Laws of the State of South Dakota for the year 1911, be and the same hereby is re-enacted as a law of this state, with the same force and effect as if passed subsequent to the amendment of Section 2 of Article XI of the State Constitution.

§ 2. An Emergency is hereby declared to exist, and this act shall be in force and take effect from and after its passage and approval.

Approved March 14, 1913.

APPENDIX—PART V.

SECTIONS OF POLITICAL CODE OF SOUTH DAKOTA 1903 AND OF SESSION LAWS OF 1903, 1905, 1907 AND 1909 RELATING TO ASSESSMENT AND TAXATION AND IN FORCE DURING YEARS 1909 AND 1910.

§ 918 P. C. (Provides that the county assessor in counties not under township organization shall perform "all and singular the acts and duties which now are or may be hereafter prescribed by law for assessors to perform.") Note. In South Dakota a part of the counties have no township organization. In such counties the assessments are made by the county commissioners.

§ 1008 P. C. (Gives the electors of each civil township in counties under township organization power to vote annually to raise such sums of money for repairing and constructing bridges and other necessary town charges as the voters may deem expedient, not exceeding an amount which will necessitate a total greater levy than five mills, and for fire guards not exceeding an amount which will necessitate a total greater levy than five mills. They may also vote the amount necessary for highway labor and road tax.)

§ 1083 P. C. The township assessors shall be governed by and make assessments and returns as provided in chapter 20 of this code, and in case where a county is fully organized into civil townships they shall be paid for their services out of the township treasury.

§ 1136 P. C. No town has power to contract debts or make expenditures for any one year in a larger sum than the amount of taxes assessed for such year, without having been authorized by a majority of the voters of such township, and no town shall assess for township purposes more than ten mills on the dollar of taxable property for any one year, except as is otherwise specifically provided by law.

§ 1229 P. C. (Relating to the general powers of city councils of cities of the first, second and third classes.) The city council shall have the following powers: * * * 3. To levy and collect taxes for general and special purposes on real and personal property.

§ 1259 P. C. (Relating to assessors in cities of the first, second and third classes.) The city assessor shall perform all the duties in relation to the assessing of property for the purpose of levying all city, county, school and state taxes. Upon the completion of the assessment roll, he shall return the same to the city auditor, who shall lay the same before the board of review or equalization at its regular meeting. It shall be the duty of the city assessor to prepare and keep in his office for the use of himself and his successor in office, in such form as he shall determine, all such information in regard to the real and personal property within the city as shall be useful and necessary in determining the value of the same for the purposes of the assessment in order to effect as near as may be a just and uniform basis and rate of assessment and valuation. He shall render such assistance to the city engineer and the city council as they may require in the making of special assessments for municipal improvements, and perform such other duties as may be prescribed by the city council.

§ 1260 P. C. (Relating to assessors in cities of the first, second and third classes.) The assessor shall be governed by the same laws and regulations as county and township assessors and shall return his assessment roll on or before the second Tuesday in June in each year. Said assessment roll shall be open to the inspection of all persons interested until the meeting of the board of equalization.

§ 1261 P. C. (Relating to cities of the first, second and third classes.) The board of equalization shall be composed of the city council and auditor, and shall meet on the third Tuesday of June in each year. The city auditor shall act as clerk of said board and keep an accurate record of all changes made in the valuation, and of all other proceedings. They may adjourn from day to day until their work is completed, and a majority of the whole board shall constitute a quorum to transact business. If no quorum is present the clerk may adjourn from day to day

and publicly announce the time to which the meeting is adjourned.

§ 1262 P. C. (Relating to cities of the first, second and third classes.) The board of equalization shall meet at the time fixed in this article at the place of meeting of the city council, and shall proceed to equalize and correct such assessment roll. They may change the valuation and assessment of any real or personal property upon the roll, by increasing or diminishing the assessed valuation thereof, as shall be reasonable and just, to render taxation uniform. Provided, that the valuation of any personal property, as returned by the assessor, shall not be increased more than twenty-five per cent without first giving the owner or his agent notice of the intention of the board to so increase it. Such notice shall be by personal notice served upon the owner or agent, or by leaving a copy at his place of business or last place of residence, and shall state the time when the board will be in session to act upon the matter.

§ 1263 P. C. (Relating to cities of the first, second and third classes.) The board of equalization must place upon and add to the assessment roll any property, real or personal, subject to taxation, which has been omitted therefrom by the owner or by the assessor, and enter the same at a valuation so that it will bear an equal and just proportion of taxation. During the session of said board any person, or his attorney or agent, feeling aggrieved by anything in the assessment roll, may apply to the board for the correction of alleged errors in the listing or valuation of his property, whether real or personal, and the board may correct the same as they may deem just; or if the board have reason to believe that any person has failed to return to the assessor all personal property required by law to be returned, or if any person refuse to swear to the returns so made, the board shall notify the person who has so failed to make return, or refused to swear to the return, in the same manner as prescribed in the preceding section of this article, and may examine each person on oath in regard to such property, or if he refuse to appear they may fix such valuation at a sum which they shall deem just. Any person feeling aggrieved at any decision of the board of equalization upon any matter that he has called upon it to correct, alter or change in reference to the listing or valuation of his property, may appeal to the circuit court in the county where the property is situated.

§ 1264 P. C. (Relating to cities of the first, second and third classes.) Within ten days after the completion of the equalization of the assessment as herein provided, the city auditor shall deliver the same to the county auditor of the county in which such city is situated, with the certificate that the same is cor-

rect as equalized by the board of equalization, and the same shall be accepted by the board of county commissioners of such county in lieu of all other assessment rolls for said property in said city subject to equalization.

§ 1265 P. C. (Relating to cities of the first, second and third classes.) The county treasurer of such county shall collect and enforce the collection of the city and school taxes with and in the same manner as other taxes, and shall pay over to the city treasurer and to the treasurer of the board of education on the first day of every month, on demand, all such taxes so collected during the preceding month, retaining one per cent of such taxes as his commission for collecting the same. He shall take duplicate receipts for all such amounts so paid by him to the city treasurer, one of which shall be forthwith sent to the city auditor; and he shall take duplicate receipts for all such amounts so paid by him to the treasurer of the board of education, one of which he shall file in his office and the other he shall forthwith transmit to the clerk of the board of education.

§ 1266 P. C. (Relating to cities of the first, second and third classes.) The city treasurer and auditor shall each apportion said amounts so received by the city treasurer, and credit each fund with its proportion or share according to the levy made by the council, and the county treasurer at the time of paying over such funds shall furnish the city treasurer and auditor with a statement of the amount collected for each year separately.

§ 1295 P. C. (Relating to cities of the first, second and third classes.) The fiscal year of each city organized under this chapter shall commence on the first day of September of each year.

§ 1296 P. C. (Relating to cities of the first, second and third classes.) The city council shall at their regular meeting in September of each year, or within ten days thereafter, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpsoe. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them or at a general or special election duly called for that purpose.

§ 54 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of commissioners shall have the follow-

ing powers: * * * 3. To levy and collect taxes for general and special purposes on real and personal property.

§ 79 Chapter 86 Laws of 1907. (Relating to cities under commission.) The city assessor shall perform all the duties in relation to the assessing of property for the purpose of levying all city, county, school and state taxes. Upon the completion of the assessment roll, he shall return the same to the city auditor, who shall lay the same before the board of review or equalization at its regular meeting. It shall be the duty of the city assessor to prepare and keep in his office for the use of himself and his successors in office, in such form as he shall determine, all such information in regard to the real and personal property within the city as shall be useful and necessary in determining the value of the same for the purpose of the assessment in order to effect as near as may be a just and uniform basis and rate of assessment and valuation. He shall render such assistance to the city engineer and the board of commissioners as they may require in the making of special assessments for municipal improvements, and perform such other duties as may be prescribed by the board of commissioners.

§ 80 Chapter 86 Laws of 1907. (Relating to cities under commission.) The assessor shall be governed by the same laws and regulations as county and township assessors and shall return his assessment roll on or before the second Tuesday in June in each year. Said assessment roll shall be open to the inspection of all persons interested until the meeting of the board of equalization.

§ 81 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of equalization shall be composed of the mayor and commissioners, and shall meet on the fourth Monday of June in each year. The city auditor shall keep an accurate record of all changes made in the valuation of property, and of all other proceedings. The board of equalization may adjourn from day to day until its work is completed, and a majority of the full board shall constitute a quorum to transact business. If no quorum is present the auditor may adjourn the board from day to day and publicly announce the time to which the meeting is adjourned.

§ 82 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of equalization shall meet at the time fixed in this act at the place of meeting of the board of commissioners, and shall proceed to equalize and correct such assessment roll. They may change the valuation and assessment of any real or personal property upon the roll, by increasing or diminishing the assessed valuation thereof, as shall be reasonable and just, to render taxation uniform. Provided, that the

valuation of any real or personal property, as returned by the assessor, shall not be increased without first giving the owner or his agent notice of the board to so increase it. Such notice shall be by personal notice served upon the owner or agent, or by leaving a copy at his place of business or last place of residence, and shall state the time when the board will be in session to act upon the matter.

§ 83 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of equalization must place upon and add to the assessmnet roll any property, real or personal, subject to taxation, which has been omitted therefrom by the owner or by the assessor, and enter the same at a valuation so that it will bear an equal and just proportion of taxation. During the session of said board any person, or his attorney or agent, feeling aggrieved by anything in the assessment roll, may apply to the board for the correction of alleged errors in the listing or valuation of his property, whether real or personal, and the board may correct the same as they may deem just; or if the board have reason to believe that any person has failed to return to the assessor all personal property required by law to be returned, or if any person refuse to swear to the returns so made, the board shall notify the person who has so failed to make return, or refused to swear to the return, in the same manner as prescribed in the preceding section of this act, and may examine such person on oath in regard to such property, or if he refuses to appear they may fix such valuation at a sum which they shall deem just. Any person feeling aggrieved at any decision of the board of equalization upon any matter that he has called upon it to correct, alter or change in reference to the listing or valuation of his own property, may appeal to the circuit court in the county where the property is situated.

§ 84 Chapter 86 Laws of 1907. (Relating to cities under commission.) Within ten days after the completion of the equalization of the assessment as herein provided, the city auditor shall deliver the same to the county auditor of the county in which such city is situated, with the certificate that the same is correct as equalized by the board of equalization, and the same shall be accepted by the board of county commissioners of such county in lieu of all other assessment rolls for said property in said city subject to equalization.

§ 85 Chapter 86 Laws of 1907. (Relating to cities under commission.) The county treasurer of such county shall collect and enforce the collection of the city and school tax with and in the same manner as other taxes, and shall pay over to the city and school district treasurers respectively, on the first of every month, on demand and without deduction of fees or com-

missions for collection, all such taxes so collected during the preceding month, and shall forthwith notify the city auditor of the amount so paid over for city purposes and the clerk of the board of education of the amount so paid over for school purposes. Provided, that in cities having a population of ten thousand or over by the last preceding federal or state census both city and school taxes shall be paid by the county treasurer to the city treasurer. The county treasurer shall include in the amounts so paid over, all moneys collected for interest or penalties upon taxes levied for city or school purposes. He shall take duplicate receipts for all such amounts so paid to the city and school treasurers, one of which receipts shall be forthwith delivered to the city auditor and to the clerk of the board of education respectively.

§ 86 Chapter 86 Laws of 1907. (Relating to cities under commission.) The city treasurer and auditor and the school treasurer and clerk of the board of education shall respectively apportion said amounts so received by the city and school treasurers, and credit each fund with its proportion or share according to the levies made by the city board of commissioners and by the board of education, and the county treasurer at the time of paying over such funds shall furnish the city treasurer and auditor and the school treasurer and clerk of the board of education with a statement of the amount collected for each year separately.

§ 116 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of commissioners shall at its first regular meeting in September of each year, or within ten days thereafter, pass an ordinance to be termed the annual appropriation ordinance, in which the board of commissioners may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation. Such ordinance shall specify the objects and purposes for which such appropriations are made and the amount appropriated for each object or purpose, which amount shall be appropriated to the credit of the proper fund. No further appropriation shall be made at any other time within such fiscal year. In said annual appropriation ordinance shall also be contained the annual tax levy, which, for all purposes excepting for the payment of principal and interest upon the bonded indebtedness of the city, shall not exceed a sum equal to twenty mills upon each dollar of the assessed valuation for the current fiscal year of the real and personal property taxable by the corporate authorities of the city. In addition to said twenty mills there may be levied a sum sufficient to pay the interest on the bonded indebtedness, and the amount necessary for any

sinking fund established to meet the principal of the bonded indebtedness as it may mature. The appropriation ordinance shall also apportion among the various funds provided for by the ordinance the amount levied for general purposes, and shall designate the amount to be applied upon each fund. The appropriation ordinance shall also specify the amount levied to pay the interest on each outstanding bond issue, and the amount levied for the purposes of each sinking fund established to pay the principal of each series of bonds when matured. The annual appropriation ordinance shall also provide for the levy of a tax for the support of the schools of the independent school district of the city, and for the payment of the interest upon the bonded indebtedness of such school district, and for the establishment of a sinking fund to pay the principal of such bonded indebtedness when same shall mature. The tax levy for school purposes other than the payment of the principal and interest of the bonded indebtedness shall not exceed annually a sum equal to twenty-five mills upon the assessed valuation of the real and personal property taxable for the current fiscal year for school purposes. Immediately after the passage and publication of the annual appropriation ordinance the city auditor shall certify the tax levies therein made to the county auditor of the county in which the city is situated in the following form, viz:

For city general purposes.....$
For city interest fund.....$
For city sinking fund.....$
For independent school district general purposes..$
For independent school district interest fund....$
For independent school district sinking fund....$

§ 128 Chapter 86 Laws of 1907. (Relating to cities under commission.) The board of education of a city organized under this act shall, on or before the regular meeting in August of each year, make an estimate of the moneys necessary for the support of the schools for the ensuing fiscal year, which fiscal year shall coincide with the fiscal year of the city. Such estimate shall itemize the various items of estimated expenditures and shall be certified by the clerk of the board of education to the city auditor on or before the first day of September of each year. The board of commissioners shall, at the time of making the tax levy for city purposes, also levy the tax for the support of the schools of the independent school district of the city for the fiscal year next ensuing, as estimated by the board of education, which estimate and tax must not exceed in any fiscal year twenty-five mills on the dollar on all personal and real property within the city which is taxable for school pur-

poses excepting as provided in section 116 of this act, and the city auditor shall certify such levy to the county auditor, as herebefore provided.

§ 1438 P. C. (Relating to incorporated towns.) The board of trustees shall have the following powers, viz: * * * 16. To levy and collect annual taxes not exceeding fifty cents on the hundred dollars valuation, and twenty-five cents poll tax on all property subject by law to taxation.

§ 2052 P. C. The word "money" or "moneys" wherever used in this chapter shall be held to mean gold and silver coin, treasury notes, bank notes, and every deposit which any person owning the same or holding in trust and residing in this state is entitled to withdraw in money on demand; the term "credit" wherever used in this chapter shall be held to mean and include every claim and demand for money or other valuable things, and every annuity or sum of money receivable at stated periods, due, or to become due, and all claims and demands secured by deeds or mortgages due or to become due. The terms "tract" or "lot" and "piece" or "parcel" of real property, and "piece or parcel of land," wherever used in this chapter shall each be held to mean any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person or company; every word importing the singular number only may be extended to and embrace the plural number; and every word importing the plural may be applied and limited to the singular number; and every word importing the masculine gender only may be extended and applied to females as well as males; wherever the word "oath" is used in this chapter it may be held to mean affirmation; and the word "swear" in this chapter may be held to mean affirm; the words "town" or "district" wherever used in this chapter shall be construed to mean townships, villages, city or ward, as the case may be. The term "true and full value" wherever used in this chapter, shall be construed to mean the usual cash selling price at the place where the property to which the term is applied shall be at the time of the assessment. The term "person" wherever used in this chapter, shall be construed to include firm, company or corporation.

§ 2053 P. C. All real and personal property in this state, and all personal property of persons residing therein, and the property of corporations, now existing or hereafter created, and the property of all banks or banking companies now existing or hereafter created, except such as is hereinafter expressly excepted, is subject to taxation; and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed in this chapter.

§ 2054. Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, trees or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries in and under the same; Providing, that trees planted under the timber culture act of congress shall not be considered as improvement on land for the purpose of taxation. The lands upon which any artesian wells shall be constructed by the owner thereof or upon which the same have been constructed by the owner thereof, shall not be assessed at any greater value by reason of said improvements, but the said lands shall be assessed the same as other lands in that locality of the same general character not irrigated or watered by artesian wells.

§ 2055 P. C. Personal property shall, for the purpose of taxation, be construed to include all goods, chattels, moneys, credits and effect, wheresoever they may be; all ships, boats and vessels belonging to the inhabitants of this state, whether at home or abroad, and all capital invested therein; all moneys at interest, whether within or without this state, due the person to be taxed, and all other debts due such person; all public stocks and securities; the capital stock of all insurance companies organized under the laws of this state; all stock in turnpikes, railroads, canals and other corporations, except national banks out of the state, owned by the inhabitants of the state; all personal estate of moneyed corporations, whether the owners thereof reside in or out of the state, and the income of any annuity, unless the capital of such annuity be taxed within the state, all shares of stock in any bank organized, or that may be organized, under any law of the United States, or of this state, and all improvements made by persons upon lands held by them under the laws of the United States, and all such improvements upon lands, the title of which is still vested in any railroad company, or any other corporation whose property is not subject to the same mode and rule of taxation as other property.

§ 2056 P. C. All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:

First. The grounds, buildings and all property belonging to or used exclusively by agricultural and horticultural societies.

Second. All property, both real and personal, belonging to any educational institution in this state, and all property used exclusively by and for the support of such school and scientific institution.

Third. All property belonging to any charitable, benevolent

or religious society, or used exclusively for charitable, benevolent or religious purposes.

Fourth. One lot in a cemetery for family use.

Fifth. The personal property of each individual liable to assessment and taxation under the provisions of this chapter of which such individual is the actual and bona fide owner, to the amount of not exceeding twenty-five dollars in value in household furniture and provisions; Provided, that each person shall list all his personal property for taxation, and the county auditor shall deduct, after county equalization, the amount of the exemption authorized by this section from the total amount of his assessment, and levy taxes upon the remainder.

§ 2057 P. C. All real and personal property in this state subject to taxation shall be listed and assessed every year with reference to its value on the first day of May preceding the assessment.

§ 2058 P. C. Personal property shall be listed in the manner following:

First. Every person of full age and sound mind, being a resident of this state, shall list his moneys, credits, bonds or stock shares, or stock of joint or other companies (when the property of such company is not assessed in this state), moneys loaned or invested, annuities, franchises, royalties and other personal property.

Second. He shall also list separately and in the name of his principal all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney or on account of any other person or persons, company or corporation whatsoever; and all moneys deposited subject to his order, draft or check, and credits due from or owing to any person or persons, body corporate or politics.

Third. The property of a minor child shall be listed by his guardian or by the person having such property in charge.

Fourth. The property of an idiot or lunatic, by the person having charge of such property.

Fifth. The property of a person for whose benefit it is held in trust by the trustee of the estate of a deceased person, by the the executor or administrator.

Sixth. The property of corporations whose assets are in the hands of receivers, by such receivers.

Seventh. The property of a body politic or corporate, by the president or proper agent or officer thereof.

Eighth. The property of a firm or company, by a partner or agent thereof.

Ninth. The property of manufacturers and others in the

care of an agent in the name of his principal, as merchandise.

§ 2059 P. C. Personal property, except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county, town or district where the owner or agent resides; the capital stock and franchises of corporations and persons, except as may be otherwise provided, shall be listed in the county, town or district where the principal office or place of business of such corporation or person is located in this state; if there be no principal office or place in this state, where any such corporation or persons transact business, their personal property pertaining to the business of a merchant or manufacturer shall be listed in the town or district where his business is carried on.

Provided, that where the owner of live stock resides in a county, town or district other than that in which such live stock ordinarily and usually ranges or feeds and where such owner has established a "ranch" or "ranches" within the county, town or district in which such live stock ordinarily and usually ranges and feeds, at which "ranch" or "ranches" the general operations of herding and feeding such stock is conducted and at which the herder or foreman of such live stock ordinarily has headquarters while in the discharge of his duties and at which such stock is ordinarily and usually rendezoused or where such live stock are pastured or ranged for such owner by any resident of such county, such live stock shall be listed and assessed in such county, town or district in which such "ranch" or "ranches" are situated, or where such live stock are pastured or ranged;

And, Provided, further, that where the owner of a stock of merchandise of any description resides in a county, town or district other than that in which the said stock of merchandise is located and offered for sale, such stock of merchandise shall be listed and assessed in the county, town or district in which such stock of merchandise is located.

§ 2060 P. C. The personal property of stage companies shall be listed and assessed in the county, town or district where the same is usually kept, except as herein otherwise provided. All persons, companies and corporations in this state owning steamboats, sailing vessels, wharf boats, barges and other water crafts, shall be required to list the same for assessment and taxation in the county, town or district in which the same may belong, or be enrolled, registered or licensed, or kept not enrolled, registered or licensed.

§ 2061 P. C. The personal property of gas and water companies shall be listed in the city or town where such personal property is located. Gas and water mains and pipes laid in

roads, streets or alleys shall be held to be personal property.

§ 2062 P. C. The personal property of street railroad, plank road, gravel road, turnpike or bridge companies, shall be listed and assessed in the county, town or district where the principal place of business is located, and the track, road or bridge shall be held to be personal property.

§ 2063 P. C. Where the owner of live stock or other personal property connected with a farm does not reside thereon, the same shall be listed and assessed in the town or district where the farm is situated.

§ 2064 P. C. The owner of personal property moving from one county, town or district to another between the first day of May and the first day of June, shall be assessed in either in which he is first called upon by the assessor. The owner of personal property moving into this state from another state or territory between the first day of May and the first day of June, shall list the property owned by him on the first day of May of such year in the county, town or district in which he resides; Provided, if such person has been assessed, and can make it appear to the assessor that he is held for tax of the current year on the property in another territory or state, county, town or district, he shall not again be assessed for such year.

§ 2065 P. C. In all questions that may arise under this article as to the proper place to list personal property, or where the same cannot be listed as stated in this article, if between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board, and when between different counties or places in different counties, by the auditor of the state, and when fixed in either case shall be as binding as if fixed by this article.

§ 2066 P. C. All live stock may be assessed at any time in the county in which they are found ranging, during the months of June, July, August, September, October and November of each year, providing that such live stock have not already been assessed in another state, or in another organized county in this state the same year.

§ 2067 P. C. In case the assessor fails or neglects to assess such live stock then the county treasurer, on the information of any citizen of such county, shall at once proceed to assess said live stock, notifying the owner or owners thereof of his action, and giving the valuation set upon the same, providing that such information to the treasurer shall be in writing, giving the approximate number of head of live stock, the name or names of the owner or owners, the range upon which said live stock are grazing, and the name of the person filing the information.

§ 2068 P. C. Every person required by this article to list

property shall make and deliver to the assessor, when required, a statement verified by oath of all the personal property in his possession or under his control, and which by the provisions of this article he is rqeuired to list for taxation, either as owner or holder thereof, or as a guardian, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent or factor, but no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation, which such company is required to list and return as its capital and property for taxation in this state. It shall be the duty of the assessors to require all persons giving in tax lists, to sign, date, and deliver to them a sworn statement upon said list, and the person called upon or required by the assessor to list his property shall answer in writing, over his signature, the following interrogatories under oath:

Interrogatory 1. Are you, or were you on the first day of May of the present year, the executor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or trustees of the property of any person, or the receiver of the property of any corporation, association or firm, or the agent or attorney of any banker investing, loaning or otherwise controlling the money or property of any other person residing in this state, of the president or according officer of any corporation, or a partner, consignee or pawnbroker? If you were, designate for whom you were or now are acting in such representative or judiciary capacity, and if you were or now are acting under the authority of any particular court, name the court, and also to what court you report.

Interrogatory 2. Have you, before the first day of May in the present year, either personally or through the agency of others, caused all or any part of your taxable money or other property to be temporarily converted either by sale, borrowing, exchanges, or in any other manner, into bonds or other securities of the United States not taxable, or any other property not taxable, with the intention to pay back, return or exchange, or sell back, such property after you have made out your tax statement, for the purpose of evading the payment of taxes on such property; or did you on or after the first day of May of the present year, and before you saw this interrogatory, pay back, return or exchange or sell back such property for the purpose aforesaid?

Interrogatory 3. If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or

invested, and the kind and amount and value thereof. And the person so answering and assessed shall date and deliver a sworn statement upon said list of the following form:

State of South Dakota,

County of.....ss.

I,.....duly sworn say, to the best of my knowledge, information and belief, the foregoing statement contains a true, full and complete list of all the property held or belonging to me, and dogs owned or kept or harbored by me on the first day of May, of the present year including all personal property appertaining to merchandising, whether held in actual possession, or only having been purchased with a view to possession or profit, and all personal property appertaining to manufacturing and all manufactured articles whether on hand, or owned by me. In all cases where I have been unable to exhibit certain classes of property to the assessor, such property has been fully and fairly described and its true condition and value represented. That I have in no case sought to mislead the assessor as to either quantity, quality or value of property, and that deductions claimed from creditors, are bona fide debts for a consideration received, and do not consist of any parts in bonds, notes, or obligations of any kind given to any insurance company on account of premium or policies, or on account of any unpaid subscriptions to any literary, scientific, or charitable institution or society, nor on account of any subscription to or indebtedness payable on capital stock of any company, whether incorporated or unincorporated; and I further swear that since the first day of May of last year, I have not directly or indirectly converted any of my property temporarily for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind. I further swear that I have to the best of my knowledge and judgment, valued said property at its true cash value, by which I mean the usual selling price, being the price which could be obtained at private sale and not forced or auction sale.

.....

Subscribed and sworn to before me this.....day of .....

.....Assessor

By.....Deputy.

Any person signing and delivering to the assessor a false statement of the foregoing form shall be guilty of the crime of

perjury and subject to the punishment by law provided for this crime.

§ 2069 P. C. If any person or corporation shall give false or fraudulent list, schedule or statement required by this article, or shall wilfully fail or refuse to deliver to the assessor, when called on for that purpose, a list of the taxable property which he is required to list under this article, or shall temporarily convert any part of his property into property not taxable for the fraudulent purpose of preventing such property from being listed, and of evading the payment of taxes theeon, he or it shall be liable to a penalty of not less than fifty dollars nor more than five thousand dollars, to be recovered in any proper form of action in the name of the State of South Dakota, on the relation of the state's attorney. The assessor shall forthwith notify the state's attorney of such delinquency or offense and he shall prosecute such offender to final judgment and execution, and such fine when collected shall be paid into the county treasury for the use of the county, and the state's attorney shall receive ten per centum commission of all moneys so collected and paid in, and a docket fee of ten dollars, to be taxed and collected with costs in such actions.

§ 2070. In every case where any person shall refuse to make out and deliver to the proper assessor the statement required under this article or shall refuse to take and subscribe to any of the oaths or affirmations required by this article, the assessor shall proceed to ascertain the number of each description of the several enumerated articles of property and the value thereof, and for this purpose he may examine on oath any person or persons whom he may suppose to have knowledge thereof, and such assessor shall make a note of such refusal in a column opposite the person's name, and the county auditor shall add to such valuation when returned by the assessor fifty per centum on the value so returned.

§ 2071 P. C. If any person required by the assessor to give evidence, as provided in the preceding section, or in any case when interrogated by the assessor as to any property, real or personal, of himself or others, shall refuse to be sworn or affirm, or if having been sworn or affirmed, he shall refuse to answer the interrogatories hereinbefore set out, or any other question touching the subject of inquiry, such person upon conviction thereof shall be fined in any sum not more than five hundred dollars, nor less than ten dollars, to which may be added imprisonment in the county jail not exceeding six months.

§ 2072 P. C. If any assessor or deputy assessor shall fail or neglect to administer to any person by him assessed any oath required by this article to be administered, he shall forfeit and

pay to the State of South Dakota, for the use of the school fund, the sum of twenty dollars for each case of such omission and neglect, which may be recovered by an action in the name of the State of South Dakota on the relation of the state's attorney, before any justice of the peace of the county, together with the costs of such action.

§ 2073 P. C. All oaths administered to any person or persons under any of the provisions of this article shall be verbal, and the person or persons making such oath shall then be required to sign same.

§ 2074 P. C. Any person, firm or corporation who shall evade, deceive or by any manner of means not list all the property, real or personal, of any and all descriptions, in addition to any and all other penalties be subject to a penalty of having added to his assessment as previously listed the amount not listed and an additional amount as a penalty of fifty per cent.

§ 2075 P. C. Any assessor or deputy, county auditor, board of review or state board of equalization, who shall upon investigation ascertain by means of investigation that any party has not so listed all or any part of his property, real or personal, shall cause the same to be listed as required in the preceding section, and the assessor or deputy or other authorized officer causing such omission and penalty to be so listed shall receive for compensation fifty per cent of the additional penalty to be paid at such times as such tax is collected on such assessment.

§ 2076 P. C. It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in such statement and enter the same opposite such items respectively, so that when completed such statement shall truly and distinctly set forth:

First. The number of horses under three years old and over six months old, and three years old and over, and the value thereof.

Second. The number of cattle under two years old and over six months old, the number of cows two years old and over, the number of all other cattle two years old and over, and the value thereof.

Third. The number of mules and asses of all ages over six months old, and the value thereof.

Fourth. The number of sheep of all ages over three months old, and the value thereof.

Fifth. The number of hogs of all ages over three months old, and the value thereof.

Sixth. The number of wagons and carriages of whatsoever kind, and the value thereof.

Seventh. The number of melodeons and organs, and the value thereof.

Eighth. The number of pianofortes, and the value thereof.

Ninth. The value of household furniture.

Tenth. The value of agricultural tools, implements and machinery.

Eleventh. The value of gold and silver plate and plated ware.

Twelfth. The value of diamonds and jewelry.

Thirteenth. The value and description of every franchise, annuity, royalty and patent right.

Fourteenth. The value of every steamboat, sailing vessel, wharf boat, barge or other water craft.

Fifteenth. The value of goods and merchandise which such person is required to list as a merchant.

Sixteenth. The value of materials and manufactured articles which such person is required to list as a manufacturer.

Seventeenth. The value of manufacturers' tools and implements and machinery, including engines and boilers.

Eighteenth. The amount of moneys of banks (other than those whose capital is represented by shares of stock), bankers, brokers or stock jobbers.

Nineteenth. The amount of credits of banks (other than those whose capital is represented by shares o fstock), bankers, brokers, or stock jobbers.

Twentieth. The amount of money other than of banks, bankers, brokers or stock jobbers.

Twenty-first. The amount of credits, other than of banks, bankers, brokers or stock jobbers.

Twenty-second. The amount and value of bonds and stock, other than bank stock.

Twenty-third. The amount and value of shares of bank stock.

Twenty-fourth. The amount and value of shares of capital stock of companies and associations not incorporated by the laws of the state.

Twenty-fifth. The value of stock and furniture of sample rooms and eating houses, including billard tables and other similar tables.

Twenty-sixth. The value of all other articles of personal property not included in the preceding twenty-five items.

Twenty-seventh. The value of all elevators, warehouses and grain therein, and improvements on lands, the title of which is vested in any railroad company.

Twenty-eighth. The value of all improvements, except plowing, on lands held under the laws of the United States and upon which final proof has not been made and accepted. The capital stock of insurance companies organized under the laws

of this state shall be assessed against such companies at the place where their principal office is located in this state.

§ 2077 P. C. Every person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view to making gain or profit by so doing, shall be held to be a manufacturer; and he shall, when required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the value of all articles purchased, received or otherwise held for the purpose of being used in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining. Every person owning a manufacturing establishment of any kind, and every manufacturer shall list, as part of his manufacturer's stock, the value of all his engines and machinery of every description, used or designed to be used in any process of refining or manufacturing, including all tools and implements of every kind used or designed to be used for the aforesaid purpose, except such fixtures as have been considered as part or any parcel of real property.

§ 2078 P. C. Whoever owns or has in his possession, or subject to his control, any goods, merchandise, grain or produce of any kind, or other personal property, within this state, with authority to sell the same, which has been purchased either in or out of the state with a view to being sold at an advanced price or profit, or which has been consigned to him from out of this state, for the purpose of being sold at any place within this state, shall be held to be a merchant, and when he is by this article required to make out to the assessor a statement of his personal property he shall state the value of such property pertaining to his business as a merchant.

§ 2079 P. C. The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated, except such corporations as are otherwise specifically provided for in this chapter, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

First. The name and location of the company or association.

Second. The amount of capital stock authorized and the number of shares into which said capital stock is divided.

Third. The amount of capital stock paid up.

Fourth. The market value, or if they have no market value, then the actual value of the shares of stock.

Fifth. The total amount of all indebtedness, except the indebtedness for current expenses, excluding from such expenses

the amount paid for the purchase or improvement of property.

Sixth. The value of all real property, if any.

Seventh. The value of its personal property. The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as bonds or stocks under subdivision 24 of section 2076. The real and personal property of each company or association shall be listed and assessed the same as other personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain.

§ 2080 P. C. The accounting officer of every bank whose capital is not represented by shares of stock, and every private banker, broker or stock jobber, shall make out and deliver to the assessor, when required to list personal property, a statement which he shall verify by oath showing:

First: The amount of money on hand or in transit.

Second. The amount of funds in the hands of other banks, brokers or others subject to draft.

Third. The amount of checks or cash items, the amount thereof not being included in either of the preceding items.

Fourth. The amount of bills receivable, discounted or purchased, and other bills due or to become due, including accounts receivable, interest accrued but not due, and interest due and unpaid.

Fifth. The amount of bonds and stocks of every kind (except United States bonds), and shares of capital stock of joint stock or other companies or corporations, held as an investment or in any way representing assets.

Sixth. All property pertaining to said business, other than real estate, which real estate shall be listed and assessed as other real estate is listed and assessed under this article.

Seventh. The amount of all deposits made with them by other parties.

Eighth. The amount of all accounts payable, other than current deposit accounts. The amount of the seventh and eighth items shall be deducted from the aggregate amounts of the first, third and fourth items, and the remainder, if any, shall be listed as money under subdivision 18 of section 2076, according to the provisions of said section; the amount of the fifth item shall be listed as bonds and stock under the said section; and the said sixth item shall be listed the same as other similar personal property is listed under this article, except that in the case of savings banks organized under the laws of this state, the amount of the seventh and eighth items above enumerated

shall be deducted from the aggregate amount of the first, second, third, fourth, fifth and sixth items also above enumerated, and the remainder, if any, shall be listed as credits according to the provisions of said section.

§ 2081 P. C. The stockholders of every bank located in this state, whether such bank has been organized under the banking laws of this state or of the United States, shall be assessed and taxed on the value of their shares of stock therein in the county, town, district, city or village where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such places or not. Such shares shall be listed and assessed annually with regard to the ownership and the value thereof on the first day of May of each year. To aid the assessor in determining the value of such shares of stock, the accounting officer of every bank shall furnish a statement to the assessor, verified by oath, showing the amount and number of such shares of capital stock of such bank, the amount of its surplus or reserve fund, and the amount of its legal investments in real estate, which real estate shall be assessed and taxed as other real estate is assessed and taxed under this chapter. The assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital and surplus fund, and the remainder shall be taken as a basis for the valuation of such shares of stock in the hands of the stockholders, subject to the provisions of law requiring all property to be assessed at its true and full value. The share of capital stock of national banks not located in this state, held in this state shall not be required to be listed under this article.

§ 2082 P. C. In every bank and banking office there shall be kept at all times a full and correct list of the names and residences of the stockholders, owners or parties interested therein, showing the number of shares and amount held, owned or controlled by each party in interest, which statement or list shall be subject to the inspection of the officer authorized to assess property for taxation; and it shall be the duty of the accounting officer or cashier of each bank or banking institution to furnish the assessor with a duplicate copy of such statement, verified by oath, which shall be returned to the county auditor and filed in his office.

§ 2083 P. C. To secure the payment of taxes on bank stock or banking capital, it shall be the duty of every bank, or managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholders or owners as shall be necessary to pay any taxes levied upon their shares of stock or interest, respectively, until it shall be made to appear to such bank or its officers that such taxes have been paid; and

any officer, or any such bank who shall pay over or authorize the paying over of any such dividend or a portion thereof, contrary to the provisions of this section, shall thereby become liable for such tax; and if the said tax shall not be paid the county treasurer where the said bank is located shall sell such shares or interest to pay the same, like other personal property; and in case of sale, the provisions of law in regard to the transfer of stock, when sold on execution, shall apply to such sale.

§ 2084 P. C. Property held under a lease for a term of three or more years, or a contract for the purchase thereof, belonging to the state or to any religious, scientific or benevolent society or institution, whether incorporated or unincorporated, or to any railroad company or corporation whose property is not taxed in the same manner as other property, shall be considered for all purposes of taxation as the property of the person so holding the same.

§ 2085 P. C. All property shall be assessed at its true and full value in money. In determining the true and full value of real and personal property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which said property would sell at auction or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself and at such a sum or price as he believes the same to be fairly worth in money.

In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also the value of all improvements, and structures thereon, and the aggregate value of the property including all structures and other improvements, excluding the value of crops growing upon cultivated lands.

In valuing any real property upon which there is a coal or other mine, or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash.

Money, whether in possession or on deposit, shall be entered in the statement at the full amount thereof.

Every credit for a sum certain, payable either in money, property of any kind, labor or services, shall be valued at the current price of the same so payable; if for a specific article or specific number or quantity of any article of property, or for a certain amount of labor, or for services of any kind, it shall be valued at the current price of such property, or for such labor or services at the place where payable.

§ 2086 P. C. The county auditor shall annually provide the

necessary assessment books and blanks at the expense of the county and have the same ready for delivery to the assessors at their meeting as hereinafter provided on the first Tuesday of April, or as soon thereafter as practical, and the same must be delivered by the last Saturday of April. The assessors shall meet the commissioners and auditor at the office of the county auditor on the first Tuesday of April for conference with the county commissioners and auditor in reference to the performance of their duties. At such time and meeting the assessors shall take the oath of office to be administered by the county auditor.

§ 2087 P. C. Each county in this state not fully organized into civil townships, shall comprise an assessor's district, excluding organized civil townshps, and the assessor thereof shall be elected at the same time that state officers are elected; Provided, that any vacancy may be filled by appointment by the county commissioners. Each organized civil township in this state shall constitute an assessor district, and the chairman of the board of supervisors for such township may be *ex-officio* assessor for such district; Provided, any vacancy in the office of township assessor may be filled by appointment by the other two members of the board of supervisors, together with a justice of the peace of said township; Provided, that cities organized under the general laws of this state shall not be included in the districts provided for in this section, but assessors of such cties shall act with the board of county assessors in any of their meetings as assessors. All assessors shall receive not to exceed three dollars per day for the time actually employed in making and completing such assessment; Provided, further, that no person shall be eligible to be assessor unless he is a voter in the district or township for which he is to be assessor.

Provided, that in counties whose area exceed forty-five congressional townships the assessor shall be allowed in the discretion of the county commissioners in addition hereto a reasonable sum for his expenses incurred in making the assessment herein required; provided, however, he shall in no event receive to exceed five dollars per day.

§ 2098 P. C. The board of supervisors of each township, the clerk, persident and board of trustees of each incorporated town, and the city council and auditor of each city (except cities whose charter provide for a board of equalization), shall meet on the fourth Monday of June at the office of the town clerk or auditor for the purpose of reviewing the assessment of property in each town or district, and they shall immediately proceed to examine, ascertain and see that all taxable property in their town or district has been properly placed upon the list

and duly valued by the assessor; in case any property, real or personal, shall have been omitted by inadvertance or otherwise it shall be the duty of the said board to place the same upon the list, with the true value thereof, and proceed to correct the assessment so that each tract or lot of real property and each article, parcel or class of personal property shall be entered on the assessment list at the true value thereof; but the assessment of the property of any person shall not be raised until such person shall have been duly notified of the intent of the board so to do, and on the application of any person considering himself aggrieved they shall review the assessment and correct the same as shall appear to them just. A majority of said officers are authorized to act at such meeting, and they may adjourn from day to day until they shall finish the hearing of all the cases presented on that day; provided, that they shall complete the equalization within six days. All complaints and grievances of individuals, residents of the town or district, in reference to the assessment of personal property, shall be heard and decided by the town board provided, that the complaints of non-residents in reference to the assessment of any property, real or personal, and of others in reference to any assessment, made after the meeting of the town board of review, shall be heard and determined by the county board.

§ 2107 P. C. The county commissioners, or a majority of them, with the county auditor, shall form a board for the equalization of the assessment of property of the county. They shall meet for this purpose annually, on the first Tuesday in July, at the office of the auditor, and having each taken an oath fairly and impartially to perform their duties as members of such board, they shall examine and compare the returns and assessment of the property of the several cities, whether organized under general law or special charter, towns or districts of the county, and proceed to equalize the same so that each tract or lot of real property and each article or class of personal property shall be entered on the assessment list at its true and full value, subject to the following rules:

First. They shall raise the valuation of each tract or lot of real property which in their opinion is returned below its true value to such price and sum as they believe to be the true and full value thereof when in an unorganized civil township.

Second. They shall reduce the valuation of each tract or lot which in their opinion is returned above its true and full value to such price and sum as they believe to be the true and full value thereof, when in an unorganized civil township.

Third. They shall raise the valuation of each class or article of personal property which in their opinion is returned below

its true and full value to such price and sum as they believe to be the true and full value thereof, and they shall raise the aggregate value of the personal property of each individual whenever they believe that such aggregate valuation is less than the valuation of the taxable personal property of such individual to such amount as they believe was the true and full value thereof, when in an unorganized civil township.

Fourth. They shall, upon complaint of any party aggrieved, being a non-resident of the town or district in which his property is assessed, reduce the valuation of each class of personal property enumerated in section 2076, which in their opinion is returned above its true and full value, to such sum and price as they believe to be the true and full value thereof; upon like complaint they shall reduce the aggregate valuation of the personal property of such individual who, in their opinion, has been assessed at too large a sum, to such sum or amount as they believe was the true and full value of the personal property.

Provided, that the assessment of the property of any resident of the county shall not be raised until such person shall have been duly notified of the intent of the board to do so.

Fifth. They shall not reduce the aggregate value of the real property, or the aggregate value of the personal property of their county below the aggregate value thereof, as returned by the assessors, except as it may be necessary to make the valuation in the different townships equal with the additions made thereto by the auditor as hereinafter required, but they may raise the aggregate valuation of such real property and of each class of personal property of said county, or any town or district thereof, whenever they believe the sum is below the true and full value of said property or class of property, to such aggregate amount as they believe to be the true and full value thereof.

Sixth. The county auditor shall keep an accurate journal or record of the proceedings and orders of said board, showing the facts and evidence upon which their action is based, and said record shall be published the same as other proceedings of county commissioners, and a copy of such published proceeding shall be transmitted to the auditor of the state, with the abstract of the assessment hereinafter required. The county board of equalization may continue in session and adjourn from time to time, not exceeding fifteen days, commencing on the said first Tuesday of July.

Seventh. During the session of the said board of assessment and equalization any person, or his attorney or agent, feeling aggrieved by anything in the assessment roll, may apply to the board for the correction of any alleged errors in the list-

ing or valuation of his property whether real or personal, and the board may correct the same as shall be just.

§ 2109 P. C. The governor, auditor, secretary of state, treasurer, and commissioner of school and public lands shall constitute the state board of equalization. Said board of equalization shall hold a session at the seat of government commencing on the first Monday of August of each year. A majority of the members of said board shall constitute a quorum and have authority to act.

§ 2110 P. C. It shall be the duty of said board to examine and compare the returns of the assessment of the property of the several counties of the state, and proceed to equalize and to assess if necessary the same so that the taxable property of the several counties shall be assessed at its proportionate value; but said board shall not increase the aggregate assessed valuation in this state as equalized by the boards of county commissioners, by more than one hundred million dollars, in addition to their assessment of corporate properties as hereinafter provided. The board may adjourn from day to day and may employ such clerical assistance as may be deemed necessary to facilitate its labors. The state auditor shall issue warrants upon the state treasurer for all necessary expenses of said board on presentation of proper vouchers therefor approved by the governor.

§ 2111 P. C. Said board has the power, and shall:

First. Equalize the assessment of land by adding to the aggregate assessed value thereof, in every county in which said board may believe the valuation to be too low, such rate per centum as will raise the same to its proper proportionate value, and by deducting from the aggregate assessed value thereof, in every county in which said board may believe the value to be too high, such per centum as will reduce the same to its proper proportionate value. Town and city lots shall be equalized in the same manner as herein provided for equalizing lands, and, at the option of said board, may be combined and equalized with lands.

Second. Equalize the assessment of personal property by adding to the aggregate assessed value of any class of personal property of every county, in which they believe such valuation to be too low, such rate per centum as will raise the same to its proper proportionate value and by deducting from the aggregate assessed value of any class of personal property, in every county in which said board may believe the valuation to be too high, such per centum as will reduce the same to its proper proportionate value.

Third. Said board, in making such equalization, may add to

or deduct from the aggregate assessed valuation of lands, town or city lots or any other class of personal property throughout the state, such per centum as may be deemed by the board to be equitable and just, but in all cases of addition to or deduction from the assessed valuation of any class of property in the several counties, or throughout the state, the rate per cent of addition or deduction shall be even and not fractional.

Fourth. The state auditor shall keep a full record of the proceedings of the board, and the same shall be published in the annual report of the auditor of the state.

Fifth. Said board shall decide upon the rate of the state tax to be levied for the current year to defray the ordinary estimated expenses of the state for such year, and to pay any deficiency that may remain unpaid of the ordinary expenses of the preceding year, and also upon the rate of state tax to be levied to pay the annual interest and to provide for a sinking fund for the payment of the principal of the public debt of the state.

§ 2135 P. C. All county, township, city, town, and school taxes, except special taxes for local improvements in cities and cities incorporated under special charters, shall be levied or voted in special amounts, and the rate per centum shall be determined from the total valuation of the property as equalized by the state board of equalization each year. The rate per centum of all taxes except the state tax shall be calculated and fixed by the county auditor in mills and tenths of mills, according to the limitations hereinafter prescribed; Provided, that if any county, city, town, township, school district or school township, shall return a greater amount than the prescribed rate will raise, then the county auditor shall extend only such amount of tax as the limited rate will produce; Provided, that after the county auditor has calculated and fixed, in mills and tenths of mills, the rate per centum of all taxes for county, township, city, town or school districts as in this article provided for, he may extend the same upon the tax lists, including the state tax levy, as one amount under the heading "Total Consolidated Tax," which, when collected, shall be apportioned by the county auditor and treasurer at the end of each month to the state, county, township, city, town or school district for which it was levied, and to be paid to said state, county, township, city, town or school district as a total amount.

Said amount when received by the state, county, township, city, town or school district, shall be by the treasurer thereof apportioned to the various funds that were authorized levied by them for the current year; and as shown by the schedule of levies and funds printed on the back of the county auditor's

orders drawn on the county treasurer in favor of said township, city, town or school district for tax collection.

It is hereby made the duty of the county auditor to have such schedule, giving each and every fund and rate per centum of the levy, printed upon the back of each tax receipt and upon the county auditor's orders on the county treasurer issued in favor of the townships, cities, towns or school districts for tax collections.

§ 2136 P. C. The state tax shall be levied by the state board of equalization, and the rate of such tax shall be certified by the state auditor to the county auditors on or before the fourth Monday in August in each year, and for ordinary state purposes shall not exceed two mills on the dollar in any one year.

§ 2137 P. C. On the first Tuesday in September of each year the board of county commissioners must meet at the county seat to levy the necessary taxes for the current fiscal year, and they may levy the taxes at any time after the said first Tuesday in September, if the statement from the state board of assessment and equalization has not been received; but such levy must not be postponed for more than ten days, and they shall levy the taxes as hereinafter directed. Such taxes shall be based upon an itemized statement of the county expenses of the ensuing year, which statement shall be included in the published proceedings of said board; and no greater levy of county tax shall be made upon the taxable property of any county than will be equal to the amount of such expenses, with an excess of five per cent of the same. The board of county commissioners shall have power to make the following levies:

1. For general county purposes, including the support of the poor, such an amount as will necessitate a rate per centum not greater than six mills.

2. For insane purposes, such an amount as may be due the state for the support of the insane from their county.

3. For county roads, such an amount as will necessitate a rate per centum not greater than two mills; Provided, that the county road tax shall not be extended against property included within the limits of any organized township or of any organized city or town.

Subdivision four (4) For county bridges such an amount as will necessitate a rate per centum not greater than three mills, except in counties where only a part of its territory is organized into civil townships, the county commissioners shall levy two mills only on organized townships.

5. For county sinking fund, such an amount as will pay one year's intrest on the bonded indebtedness of the county, with not to exceed fifteen per cent of the principal. The money from

the sinking fund tax shall be applied to no other purpose than the payment of outstanding bonds and interest on the same, until such bonds and interest are fully paid, when any surplus remaining shall be transferred to the county general fund. Provided, that the total county rate shall not exceed in any one year the sum of ten mills on the dollar for all purposes.

6. The county commissioners of each county also may levy a tax of one dollar on each elector in the county for the support of the common schools, and no property shall be exempt from the collection of such tax by distress or otherwise, which taxes when so collected shall be distributed to the several school corporations in the county in proportion to the number of children resident in the territory of each, from six to twenty years of age inclusive.

7. In all counties not wholly organized into civil townships the county commissioners shall levy on each male person living in an unorganized township, and outside the boundaries of any organized city or town in said county, and being above twenty-one years of age and under the age of fifty, excepting paupers, idiots, lunatics and such others as may be exempted by law, a road poll tax of one dollar and fifty cents which must be paid in money or by one day's labor in each year on the public highways within his road district at the time and place directed by the road overseer, and if not worked out or paid on demand, then no property shall be exempt to make the collection of such tax by distress or otherwise; Provided, that the county commissioners shall have power to levy taxes against the property of such unorganized township for fire guards as now provided by law.

8. The county commissioners of each county shall cause to be charged upon the tax list against the name of each person returned by the assessor as the owner or keeper of a dog or dogs, as a tax the sum of one dollar for each dog owned or kept by such person, which tax when collected shall be credited to the school fund and return the same to the school district from which it was collected.

§ 2139 P. C. In every district having but one school, a majority of the qualified electors thereof shall, at any regularly called school meeting, have authority to instruct the district school baord concerning the levy of school taxes for the maintenance of the same. Said taxes shall be levied at the annual school meeting and shall be certified by the school clerk to the county auditor of the county in which the district is situated, immediately thereafter.

2. The school board of a school township shall have power

to levy upon all the property subject to taxation in the township a tax for school purposes of all kinds authorized by law. Such tax shall be levied by resolution of the board prior to the fifteenth day of August in each year, and no tax shall be levied except by an affirmative vote of a majority of the members of the board, and a resolution to levy a tax and the vote thereon shall be entered in the record of the proceedings of the board. The clerk shall immediately thereafter certify to the county auditor of the county in which the school township is situated the amount of tax so levied.

3. The board of education of any town or city shall, on or before the fifteenth day of August in each year, levy a tax for the support of the schools of the corporation for the fiscal year next ensuing, on all property subject to taxation in the district, which levy the clerk of the board of education shall immediately thereafter certify to the county auditor of the county in which said town or city is situated.

4. In any school townshp, school district, or city or town independent school district, where there are bonds outstanding, the school board shall have power, at the time the school taxes are levied, to levy a tax to pay the interest on said outstanding bonds as the same may become due, and not to exceed fifteen per cent on the principal as a sinking fund. Said tax shall be certified to the county auditor by the school clerk at the same time that the levies for other purposes are certified. The money obtained from the levies for the interest and sinking fund shall not be used for any other purpose than that for which the levies are made.

5. Whenever there shall be any bonded indebtedness outstanding against a school township, which township shall be subdivided into school districts by action of the county commissioners, the said commissioners shall levy a tax annually on the property of the new districts formed therefrom, sufficient to pay the interest and principal of the bonds as the same become due.

§ 2140 P. C. The city council in all cities organized under the general laws of the state or under special laws, unless otherwise provided for in their charters, the provisions of such charters are not modified by this article, shall, at their first regular meeting in September in each year, or within ten days thereafter, levy a tax for general purposes sufficient to meet the current expenses of the year, based upon estimates furnished by the city auditor or a committee from the city council, which estimate shall be entered upon the regular minutes of said council, and such levy for general purposes shall not exceed an amount that will necessitate a greater rate per centum than

twenty mills. In addition thereto may be levied a sum sufficient to pay the interest on the bonded indebtedness and a sinking fund sufficient to meet the principal of said bonds as they mature. Said tax levies shall, immediately after they are made, be certified by the city auditor to the county auditor of the county in which such city is situated.

2. Incorporated towns organized under the general laws of this state, or under special laws, unless otherwise provided for in their charter, the board of trustees shall, before the third Tuesday in May in each year, levy the amount of the general town tax for the current year, and for any debt created under section 1446 of this code, the board of trustees, at the time the general town tax is levied, shall levy an additional tax each year sufficient to pay the annual interest, with an addition of not less than five cents nor more than fifty cents on each one hundred dollars of valuation to create a sinking fund for the liquidation thereof. Such tax shall be used for no other purpose than the payment of the debts and the interest thereon. Immediately after the levy of the taxes as herein set forth, the town clerk shall certify to the county auditor of the county in which such town is situated the amounts of such levy, in the following form, viz:

For general fund.....dollars
For interest fund.....dollars
For sinking fund.....dollars

3. The county auditor shall calculate and fix the rate per centum of all city and town taxes and shall enter the same on the tax lists for collection as other taxes are collected, consolidating the several levies of city tax or of town tax in one column.

Provided, that the general fund tax rate for incorporated towns and villages shall not in any one year exceed the sum of five mills on the dollar for all purposes.

§ 2185 P. C. On the first day of October in each and every year the county treasurer shall make a list of all delinquent personal property taxes and certify the same to the sheriff of his county. On receipt of the same the sheriff shall file the list in his office and immediately proceed to collect such delinquent taxes in the manner and method now provided by law for the collection of delinquent personal property taxes by the treasurer, and the sheriff shall be entitled to the same fee for collecting such taxes as is by law given to the county treasurer for levy and distraint, and the county treasurer shall receive no fee on money so collected by the sheriff other than the per centage allowed and credited to the special salary fund. Provided, however, that nothing in this section shall prevent the treasurer from receiving taxes and issuing receipts therefor as hereto-

fore, and (in) addition to the taxes, penalty and interest due, shall collect all accrued cost of the sheriff incurred under the provisions of this section; Provided, that no cost shall be collected by the treasurer or paid to the sheriff unless the sheriff shall before such payment file an itemized statement of said costs on or before the last Monday of November in each year after receiving such list of taxes, and shall make a return of his full proceedings thereunder and file the same with the county treasurer. For such taxes as have been collected there must be attached to said return a duplicate receipt to the sheriff from the county treasurer showing the total amount paid into the treasury since the last return, and for such taxes as are not collected, a statement showing why they are not so collected must be attached. No fees shall be paid to the sheriff for such collection, except out of taxes collected, as hereinafter provided. The county treasurer shall furnish the sheriff with tax receipts for such collections, and they shall have the following words printed at the top of each receipt: "Sheriff's receipt for delinquent personal property taxes." The sheriff shall turn over to the county treasurer the full amount collected at the close of each month, including all mileage allowed by law and other costs and fees collected, and take a receipt from the county treasurer on the stub or duplicate of each receipt so issued, for each and every collection. The county treasurer shall on the last day of each month furnish the sheriff with a certified list of all fees, mileage and other amounts which by law is now allowed to the county treasurer that have been paid into his office by the sheriff, and the sheriff shall file such list with the county auditor as a bill against the county, for which the board of county commissioners shall allow the sheriff a warrant in full.

§ 2192 P. C. On the first day of March of the year after which taxes shall have been assessed, all unpaid taxes shall become delinquent, and shall draw interest and penalty as follows: On the first day of March one per cent shall attach and be added on the amount so remaining unpaid, and one per cent a month thereafter until paid to be added on the first day of each month, which shall be added to the amount assessed, and collected by the county treasurer; Provided, that if any person shall pay one-half of the amount of taxes due from him on or before the first day of March of the year after which such taxes shall have been assesesd, the balance shall not become delinquent until the first day of October thereafter, upon which day, if not paid, a penalty of one per cent a month thereafter until paid to be added on the first day of each month, which shall be added to the balance unpaid, and collected by the coun-

ty treasurer; and said treasurer shall make sales for the balance of unpaid taxes in such cases in the same manner as in cases where no part of the tax has been paid.

§ 2193 P. C. In case of failure to collect any personal tax by voluntary payment by the party assessed or by distress and sale, the county treasurer must collect the same by advertising and selling any real estate against which the tax is a lien.

§ 2194 P. C. The treasurer shall give notice of the sale of real property by publication thereof for three consecutive weeks next preceding the sale, in a newspaper in his county, if there be one; and if there be no newspaper published in his county, he shall give notice by written or printed notice posted at the door of the court house or building in which the courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. Such notice shall contain a notification that all lands on which the taxes of the preceding year or years remain unpaid will be sold, and the time and place of the sale; and said notice must contain a list of the lands to be sold, the name of the parties to whom they are assessed, and the amount of taxes, both real and personal, due; provided, that when any real property not exceeding twenty-five dollars in assessed value shall have been advertised in a newspaper for two successive years and not sold, the treasurer shall give notice of the sale of said property by posting a written notice in the manner provided when there is no newspaper published in the county, and the same shall not be advertised in a newspaper. The county treasurer shall charge and collect in addition to the taxes and interest and penalty the sum of ten cents on each tract of real property and on each town lot advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the cost of publication; but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising.

§ 2195 P. C. On the second Monday of November in each year, between the hours of nine o'clock a. m. and four o'clock p. m., the treasurer is directed to offer at public sale at the court house, or at the place of holding courts in his county, or at the treasurer's office where by law the taxes are made payable, all lands, town lots or other real property which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid, and he may adjourn the sale from day to day until all the lands, lots or other real property have been offered; and no taxable property shall be exempt from levy and sale for taxes.

§ 2199. The purchaser of any tract of land sold by the

county treasurer for taxes will be entitled to a certificate describing the land so purchased, the sum paid and stating the time when the purchaser will be entitled to a deed, which certificate shall be signed by the treasurer in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings. Such certificate shall be assignable and any assignment thereof must be acknowledged before some officer having power to take acknowledgments of deeds. Any assignee of such certificate acquires the lien of the taxes on the land provided he presents the assigned certificate to the said county treasurer for entry and said county treasurer shall enter on the record of said sale the fact that the certificate has been assigned, entering the name and address of the assignee and the date when said assignment was presented for such entry.

Said purchaser at tax sale or assignee of such certificate may pay any taxes levied on said land so purchased whether levied for any year or years previous or subsequent to such sale and still unpaid and shall have the same lien for such taxes paid subsequently and may add them to the amount paid by him in the purchase, provided that he shall inform the county treasurer when paying such taxes that he desires to pay them as subsequent to such certificate and the treasurer shall make out the tax receipt and duplicate for such taxes paid as subsequent, and shall write thereon "paid as subsequent taxes" and shall enter on the record of the original tax sale the payment of such subsequent taxes giving the name of the person by whom paid, the date when paid, and the amount paid, and for what year such subsequent tax was levied. In all tax sales made as provided herein the treasurer shall make out the tax receipt and duplicate for the taxes of the real estate mentioned in such certificate the same as in other cases, and shall write thereon "sold for taxes at public sale."

§ 2208 P. C. The owner or occupant of any land sold for taxes, or any other person, may redeem the same at any time within two years after the date of such sale, or at any time before the execution of a deed of conveyance thereof by the county treasurer, by paying the treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in the certificate, and interest thereon at the rate at which the land was sold, from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment; and the treasurer shall enter a memorandum of the redemption in the list of sales, and give a receipt therefor to the person redeeming the same, and file a duplicate of the same with the county auditor as in other cases,

and hold the money paid to the order of the purchaser, his agent or attorney; Provided, that infants, idiots and insane persons may redeem any land belonging to them, sold for taxes, within one year after the expiration of such disabilities; and, Provided, further, that when the owner or occupant of any land which has been sold for taxes, and who desires to redeem the same, shall not demand a receipt or certificate of redemption from the treasurer, the return of the certificate of purchase for cancellation shall operate as a release of all the claims to the tract or lot described therein, under or by virtue of the purchase, and the county treasurer, upon receiving such certificate of puchase, shall mark on the tax sale record opposite the description of the property for which said certificate of purchase has been issued, "sale canceled by return of certificate." No fee shall be charged for services provided for in this section.

§ 2212 P. C. If no person shall redeem lands sold for taxes within two years from the date of sale, at the end of the said two years the lawful holder of the certificate of purchase shall cause a notice to be served upon the owner of the land so sold, and upon the person in possession of such land or town lot unredeemed, and also upon the person in whose name the land is taxed, in the manner provided by law for the service of summons signed by him, his agent or attorney, stating the date of sale, the description of the property sold, the name of the purchaser and assignee, if any, and that the right of redemption will expire and a deed for the said land or lot may be made within 60 days from the completed service thereof. Service shall be deemed complete when an affidavit of the service of the said notice and of the particular mode thereof, duly signed and verified by the person or officer making the service, shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice herein required, and until sixty days after the service of said notice the right of redemption from such sale shall not expire. The cost of serving said notice, whether by publication or otherwise, together with the cost of the affidavit, shall be added to the redemption money; provided, the treasurer shall have received notice that the service had been begun or made and a statement of the said costs filed in his office. Immediately after the expiration of sixty days from the date of completed service of the notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of land sold and remaining unredeemed. Said deed shall be countersigned by the county auditor, with the seal attached, and shall

be delivered to the purchaser or his assignee upon the return of the certificate of purchase. The treasurer shall receive one dollar for each deed made by him on such sales, but any number of parcels of land bought by one person may be included in one deed, as the holder may desire. Said deed shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all claims which the state may have therein for taxes or liens or incumbrances; provided, that the person demanding said tax deed shall purchase the assignment of all prior tax certificates held by the county on said land before the county treasurer shall issue the tax deed.

§ 1. Chapter 124 Laws of 1907. That any person, firm or corporation feeling aggrieved may appeal from any decision or decisions of any board of equalization of any county, city, town or township in this state to the circuit of the county wherein such decision or decisions were made within the same and in the same manner and upon the same conditions and terms as appeals may be taken from the decisions of the board of county commissioners of any county in the state, and when there are more than one decision made by any such board during any session thereof, then any such persons, firm or corporation may appeal from any one or more of such decisions as aforesaid which decisions may be included in and be appealed from as one appeal. Such appeals shall be heard and determined in the same manner as appeals from the board of county commissioners are heard and determined.

§ 850 P. C. From all decisions of the board of commissioners upon matters properly before them, there, shall be allowed an appeal to the circuit court by any person aggrieved, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county auditor, conditioned that the appellant will prosecute his or her appeal without delay, and pay all costs that he or she may be adjudged to pay in the said circut court; said bonds shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein; provided, that any state's attorney, upon the written demand of at least seven taxpayers of the county, shall take an appeal from any action of the board of county commissioners of such county when said action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, when he deems it to the interest of the county so to do; and in such case no bond shall be required or given, and upon serving the notice provided for in section 851 the county auditor shall proceed the same as if a bond had been filed, and his

fees for making the transcript shall be paid as other claims by the county.

§ 851 P. C. Said appeal shall be taken within twenty days after the decision of said board, by serving a written notice on one of the board of county commissioners; and the county auditor shall, upon the filing of the bond and the payment of his fees which shall be the same as allowed registers of deeds for like service, make out a complete transcript of the proceedings of said board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the circuit court.

§ 852 P. C. Said appeal shall be filed by the first day of the circuit court next after such appeal, and said cause shall stand for trial at such term.

§ 853 P. C. All appeals thus taken to the circuit court shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*.

§ 854 P. C. The circuit court may make a final judgment and cause the same to be executed, or may send the same back to the board with an order how to proceed, and require said board of county commissioners to comply therewith by mandamus or attachment as for contempt.

APPENDIX—PART VI.

OPINION OF HONORABLE CHARLES A. WILLARD, DISTRICT JUDGE, IN CASES OF JAMES C. FARGO VS. GEORGE G. JOHNSON AS TREASURER, AND WELLS FARGO & COMPANY VS. GEORGE G. JOHNSON AS TREASURER, INVOLVING VALIDITY OF 1909 TAXES ASSESSED IN SOUTH DAKOTA AGAINST EXPRESS COMPANIES.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH DAKOTA,

Southern Division.

James C. Fargo, Individually,
and as President of the American
Express Co.

v.

George G. Johnson, as Treasurer of
the state of South Dakota.
Wells, Fargo & Co.

v.

Same.

This cause came on for final hearing before the Court on the 25th and 26th days of July, A. D. 1911, and was argued by counsel, Charles O. Bailey, Esq., appearing for the complainant, and L. T. Boucher, Esq., for the defendant.

After considering the evidence and the arguments of counsel thereon, the Court rendered the following oral decision:

Two ways of taxing railroad companies, express companies and corporations of similar character are in common use in the United States. One of these is by taxing the property of the corporations, tangible or intangible. The other is by taxing the gross earnings or the net earnings of the corporations. One of these is in its nature a tax upon property, and the other is in its nature a tax upon income. They differ radically from each other. Some states in the Union have adopted one method and other states have adopted the other method. The State of South Dakota has adopted the first method. It has provided in its constitution that corporations of this character shall be taxed by determining the value of the property of the corporation, and assessing a tax upon the value so determined.

Article XI Section 2 of that constitution provides as follows:

> "All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property."

It is thus seen that the state of South Dakota is absolutely committed by its constitution to the taxation of property of corporations by determining the value of such property, and it is committed to that method of taxation to the exclusion of taxation of corporations upon their gross or net earnings. So true is this that it was stated at the bar that two attempts since 1907 have been made to amend the Constitution so as to allow the taxation of corporations by a determination of their gross earnings, and the levying of a certain percent of those gross earnings as a tax to be payable to the state, but these attempts have been defeated.

Chapter 64 of the Laws of 1907, of the State of South Dakota, does not upon its face attempt in any way to modify or change this constitutional rule. Sections 16 and 17 relate to the assessment and taxation of express companies. Section 17 provides in part as follows:

> "The State Board of Assessment and Equalization shall, on the first Monday of July, in each year assess all the property of every express and sleeping car company doing

business in this state and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state for the year ending on the 30th day of April, preceding the statements made by said companies and by the Board of Railway Commissioners, and any and all matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals."

It is clear, therefore, both from the constitution and the law, that the property of express companies must be taxed by virtue of a previous assessment of the value of that property. It is also clear that neither the constitution, nor Chapter 64 of the Laws of 1907 nor any other law of the state so far as I am advised, permits or allows an express company to be taxed by a percentage of its gross earnings. It was the duty of the state board of assessment and equalization to tax the express companies involved in this litigation in the manner pointed out by the Constitution and in the law, and it was prohibited from taxing those companies by reference exclusively to their gross earnings. Under the constitution and the law it was the duty of this Board to make an assessment of the value of the property of the express companies, and the first question in the case is, did the State Board determine the value of the property of the express companies who have brought these actions? Fortunately the evidence leaves no doubt whatever upon that question. It is proven by a mathematical demonstration that the Board of Assessment and Equalization never made any assessment of the value of the property, either of the American Express Co. or of the Wells-Fargo Express Co. It appears from the evidence, and it appeared before the Board, that the American Express Company for the year ending April 30, 1909, had paid to the railroad companies over which it operated $107,158.82. The tax assessed against the American Express Company for that year was $4,286.35. Multiplying $107,158.82 by four per cent, we get exactly the amount of the tax, $4,286.35. It appears that the Board, acting under the authority given to it by the law, determined that the rate of taxation should be twenty-five mills. Dividing $4,286.35 by .025 we have $171,454, which is the exact amount for which the company was assessed. It thus appears that the Board instead of making an assessment of the property and from that determining the tax, determined in the first place the tax, and then adopting the sum of twenty-five mills as the rate of taxation, determined to assess it at that figure. That mathematical demonstration would be sufficient alone to show the method by which the Board reached the

assessment, but that is not all. It appears from the evidence that the Western Express Company paid to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company over whose line it operated, for the year in question, $1,414.30. The tax assessed against that company by the Board was $56.57. Dividing $56.57 by .025, you have the sum of $2,262, which is the exact amount of the assessment made by the Board against the Western Express Company.

The Great Northern Express Company paid to the Great Northern Railroad Company over which it operated, the sum of $7,049.84 for the year in question; the tax assessed against that company was $281.99, which is four per cent of that sum. Dividing $281.99 by .025 you have $11,278, which is the exact amount of the assessment made against the Great Northern Express Company for that year.

The figures in connection with the Wells-Fargo Company assessment and taxation produce exactly the same result. In that case the demonstration is a little more confused from the fact that the Wells-Fargo Company were not operating any express lines during the year ending April 30, 1909, but on May 1, 1909, bought the property of the United States Express Co. The assessment of the Wells-Fargo Company for that year was determined by taking the amount paid by the United States Express Company to the railroads over which it operated, after allowing a certain part of that amount for business still carried by the United States Express Company and not sold to Wells-Fargo & Co., and the remainder was treated in the same way and produced exactly the same result.

It thus appears beyond all question that the taxation in this case was determined by taking the amount paid to the railroad companies by the different express companies, and multiplying that by four per cent and the tax having been determined in that way, the Board then fixed the value of the property in the way I pointed out. Of that there is no question. That the Board in effect intended to tax these companies upon their earnings and not upon the value of their propertyI think appears also from the evidence of the members of the Board.

John Hirning, the State Auditor, testified as follows:

"Q. Isn't it a fact, Mr. Hirning, that the Board, in making the assessment upon the American Express Company for the year 1909, attempted to make an assessment which would require the payment by the American Express Company of four per cent of its gross earnings? A. The Board tried to place a valuation on that property in order to get what they considered the fair tax on the property of the company, considering the gross earnings."

Answering further he said,—

"Well, we thought the State ought to be entitled to a tax to about that amount."

He also testified:

"Q. Is it not a fact that that valuation was one which would yield as nearly as you could figure it out a tax of four per cent of the gross earnings? A. It figures out that way."

This witness afterwards corrected his testimony so as to have it read,—"It figures out that way according to the figures which you give."

Mr. Polley, Secretary of State and a member of the Board, testified as follows,—

"A. Well, we had the report from the Express Company and we also had reports from the various railroad companies showing the amount of money that had been received from the express companies, and from that, or possibly other information, I don't remember which, we arrived at the amount of money that those companies earned, and then, so far as I was concerned, I concluded that a company or a plant, or a business that would earn the amount of money shown there was worth a certain amount based on it. * * *

Q. Now in considering the gross earnings of the express companies, did you estimate that the several express companies paid 50% of their gross earnings to the railroad companies? A. Why, that was my understanding of the matter at that time, and has always been my impression, that they paid half of the gross income to the railroad companies that hauled the express matter for them."

That answer would indicate that they did not assess the companies four per cent of their gross earnings, but four per cent of one-half of their gross earnings, or two per cent of their gross earnings, but it makes no difference whether they assessed the company four per cent or two per cent, or whether they assessed them upon all of their earnings or part of their earnings, or whether they assessed them upon their net earnings or their gross earnings. If the taxation was made exclusively with reference to their earnings, or even, no matter how it was made if it was not made after an assessment of the value of the property had been made by the Board are such assessment and taxation valid? I think it is demonstrated that the Board never made any assessment of the value of the property of these companies, and it makes no difference what other ways they used to arrive at this result if they did not make an assessment as the law required.

I have listened with a good deal of interest to the discussion at the bar with reference to the cases of Adams Express Co. v. Ohio Auditor, 166 U. S.; Fargo v. Hart, 193 U. S.; and Pacific Express Co. v. Seibert 142 U. S. 348, but so far as this case is concerned, that discussion has been purely academic. I pass by the question as to whether the State of South Dakota, without an Act expressly allowing it such as exists in Ohio and Indiana, could adopt the system of taxation that was there used. It is not at all necessary to a determination of the question here, because it sufficiently appears that the Board of Assessment and Equalization in this case adopted no such method. The basis of this assessment was; first, the amount of money paid by the Express Companies to the Railroad Companies. Second, four per cent. Third, twenty-five mills. Those were the three elements that were used in making this assessment and those were the exclusive elements. Nothing else was used.

What possible relation has the amount paid by the American Express Company to the railroads over which it operated in South Dakota to the capital stock of the express company? What possible relation has that datum to the number of miles over which the American Express Company operates in the United States? What possible relation has it to the proportion of its mileage in the state of South Dakota to the entire mileage of the company? Absolutely none. What possible relation has four per cent to any one of those elements? Absolutely none. It is demonstrated by the evidence beyond a possibility of error that this Board took into consideration in fixing this assessment neither the capital stock of the company, nor the mileage of the company, nor the proportion of mileage in South Dakota to the entire mileage, nor the proportion of the property used in South Dakota to the entire property. They took into consideration primarily the one element of the amount of money paid by the express companies to the railroad companies. Then they determined that four per cent on that amount would be a proper tax. They in fact abandoned not only the constitution but the law, and instead of making an assessment upon the property, tangible and intangible, of the express companies, they undertook to tax the company upon its earnings.

What would be said of a Board of Assessors of a county who in determining the tax that should be paid by a farmer should take into consideration the gross earnings of his farm for the year preceding, say that such a farm as that ought to pay four per cent upon those gross earnings, and having taken the rate of twenty-five mills to determine what his assessment should be,

should then assess his farm and his stock and machinery upon that basis?

If the method of taxation adopted in the case at bar is valid under the law of South Dakota, then I see no escape from a holding that the method to which I have referred relating to the farmer is also valid. That it is not valid needs no further citation than the case decided by the Supreme Court of the State of South Dakota and quoted at length in the brief of the state, the case of the American Express Company against the Board of Assessment and Equalization, 53 N. W. Rep. 192, and 3d South Dakota. It was there said,—

> "In other words, when such Courts, officers, Boards or tribunals have jurisdiction of the subject matter and of the party, their action will be sustained unless in their proceedings they do some act forbidden by law, or neglect to do some act required by law; or, as stated by Judge Cooley, 'when the assessment is erroneous in point of law, either because the assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of the statute on which parties assessed have a right to reply,' certiorari will lie to correct the proceedings."

That in this case this Board did adopt an inadmissible basis in making the assessment seems too plain for argument.

The express companies were entitled to have the constitution and the law followed with reference to the basis on which the assessment was to be made, they were entitled to have an assessment of their property in the state based upon its value, they were entitled to have the Board determine what the value of their property within the state was. The question as to just how that shall be determined, whether it shall be determined upon the mileage basis, whether it shall be determined with reference to their capital stock, whether it shall be determined by the unit system, whether it shall be determined with reference to the tangible property within the state, are matters of no consequence in this case. The companies are entitled to have the Board exercise their judgment in one of those various ways. The evidence shows conclusively in this case that they did not exercise their judgment in any one of them; that they never made any determination at all of the value of the property of the companies.

I have no quarrel with the case above referred to decided in the state of South Dakota, because it appears in that case that the Board did make an assessment of $35,000 as the value of the property of the American Express Company. They took into consideration, as the Court held they had a right to take

into consideration, the contracts existing between the Express Company and the Railroad Company. In other words, they assessed, as undoubtedly they had a right to assess, the intangible property as well as the tangible property and if any attempt of that kind had been made in this case, a different question would have been presented. Nothing of that kind was done. They made no effort to determine what the value of the intangible property of this company was. They made no effort to determine what the value of its right to do business in the state was. They took the amount paid by the Express Companies to the railroad companies and determined the taxation and assessment by taking four per cent of this amount, and they did nothing more.

Of course the return made by the express company is not at all conclusive. The Board has a right to go beyond that. It has a right to assess the intangible property as well as the tangible property, and to tax it, but they did not do that, and the Board having proceeded upon an inadmissible basis in making this assessment, the assessment is void, and the tax based upon it is void.

It is claimed by the companies that Chapter 64 of the laws of 1907 is unconstitutional because it deprives the companies of the equal protection of the laws in that it assesses their property in a different way from the property of other corporations. It is not at all necessary to decide that question, and I express no opinion upon it. I assume for the purposes of this case that Chapter 64 is valid, that it is valid insofar as it allows the Board to take into consideration the gross earnings of the companies, but I hold that this assessment was void because the Board did not follow the law, and never made any determination of the value of the property.

It is suggested by the State that no grounds of equitable jurisdiction are presented by the bill. A preliminary injunction was granted in the case, granted as I understand it after argument by Judge Carland, and after argument on this specific objection. By granting the injunction he necessarily held that the bill did present a case of equitable cognizance and equitable jurisdiction. This ruling was by the Court in which I now preside. The Court is the same though the Judges that hold the Court may change. A Court ought not to make a ruling on a question, and later change that ruling and make an exactly opposite ruling upon the same question and in the same case. Therefore, without expressing any opinion of my own upon the question as to whether this bill presents a case of equitable cognizance, I overrule the objection based on that ground and hold that it does, following the decision already

made on the motion for a preliminary injunction.

Let a decree be entered for the complainant as prayed for in the bill, with costs.

CHARLES A. WILLARD,
Judge.

APPENDIX—PART VII.

OPINION OF HON. WALTER H. SANBORN, CIRCUIT JUDGE, IN THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, IN CASES OF WELLS FARGO & COMPANY VS. GEORGE G. JOHNSON, AS STATE TREASURER, AND JAMES C. FARGO VS. GEORGE G. JOHNSON AS STATE TREASURER.

UNITED STATES CIRCUIT COURT OF APPEALS EIGHTH CIRCUIT

No. 4039.—DECEMBER TERM, A. D. 1913.

Wells Fargo and Company,
Appellant,
vs.
George G. Johnson, as Treasurer of the State of South Dakota,
Appellee.
Appeal from the District Court of the United States for the District of South Dakota.

No. 4040.—DECEMBER TERM, A. D. 1913.

James C. Fargo, individually and as President of the American Express Company,
Appellant,
vs.
George G. Johnson, as Treasurer of the State of South Dakota,
Appellee.
Appeal from the District Court of the United States for the District of South Dakota.

Mr. C. O. Bailey (Messrs. Bailey & Voorhees, Mr. Joseph W.

Welsh and Mr. Charles W. Stockton, were with him on the brief), for appellants.

Mr. Royal C. Johnson, Attorney General of South Dakota, and Mr. L. T. Boucher, appeared for appellee.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

SYLLABUS.

1. TAXATION — ASSESSMENT — EXPRESS COMPANIES—PROVISION OF SOUTH DAKOTA STATUTE UNCONSTITUTIONAL.

In 1910 the Constitution of South Dakota provided that "all taxation shall be equal and uniform," that "all taxes to be raised in this State shall be uniform on all real and personal property according to its value in money to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property." While the property of individuals and of the great majority of the tax payers in the State was assessed according to its actual value in money without considering the earnings of its respective owners, and taxes were levied at a uniform rate on all assessments, the Legislature required the State Board of Assessment and Equalization in making the assessments upon the property of each express company doing business in that State to "take into consideration the gross earnings of said company within the State for the year ending on the 30th day of April preceding." Laws of South Dakota 1907, Chap. 64, Sec. 17, and the Board did so and measured the assessments of the property of such companies by the companies' earnings far more than by other matters considered.

HELD: That provision of Section 17 quoted violated the provisions of the constitution quoted and the assessments of the property of the express companies were void.

2. COURTS—OPINIONS—NOT AUTHORITATIVE BEYOND QUESTIONS DECIDED.

"General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

3. TAXATION—INJUNCTION—SYSTEMATIC, REPEATED UNCONSTITUTIONAL ASSESSMENTS JUSTIFY INJUNCTION.

Systematic, repeated, continuing violations of the constitution or the law in the making of assessments and the levying of taxes, like continuing trespasses, justify an injunction against the continuance of such a course and the collection of taxes so levied.

SANBORN, Circuit Judge, delivered the opinion of the Court.

These are appeals from decrees which dismissed complaints to enjoin the treasurer of South Dakota from collecting taxes levied against the plaintiffs by the State Board of Assessment and Equalization of the State of South Dakota in the year 1910. The plaintiffs are express companies and they claim that the assessments of their property made by the Board in 1909 and 1910, on which it levied the taxes in those years, were made in violation of the Constitution of the State of South Dakota in that in making them it took into consideration their earnings in the State while the earnings of the great majority of the tax payers of the State were not considered in assessing their property for taxation, that these assesments were made in violation of the statutes of that State in that the Board based them on a certain percentage of the respective amounts the plaintiffs paid to the railroad companies for transportation services in South Dakota instead of founding them on the values of their personal and real properities, and for other reasons. They brought suits on these grounds to enjoin the collection of the taxes in 1909 against them. Those suits were heard and decided in their favor by Judge Willard and decrees for injunctions were rendered from which no appeals were ever taken. Before the decision of those cases was made the Board had made the assessments of 1910 which the court below has sustained in these cases and that ruling is assigned as error. These cases were heard together and whatever is said concerning one of them in this opinion which is not clearly applicable to that one alone is equally applicable to the other.

The Constitution of South Dakota in force in 1909 and 1910 provides in Article 6, Section 17, that "all taxation shall be equal and uniform" and in Article 11, Section 2, that "all taxes to be raised in this State shall be uniform on all real and personal property according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and the Legislature shall provide by general law for the assessing and levying of taxes on all corpora-

tion property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property." Section 17, of Chapter 64 of the laws of South Dakota 1907, which was in force in 1909 and 1910, provides that the Board shall "On the first Monday in July each year assess all the property of every express and sleeping car company doing business in this State and used in the operation and maintenance of its business and in doing so shall take into consideration the gross earnings of said company within the State for the year eding on the thirtieth day of April preceding, the statements made by said companies and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals," and that "said board shall levy a tax upon said property which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year." Section 16 of the Act provided that every express company doing business within the State must transmit to the state auditor on or before July in each year a statement of the gross earnings of the total business of the company transacted in the State for the year ending April 30th preceding, and of the value of its office furniture, fixtures and real estate within the State. Wells Fargo & Company made a statement to the auditor in June, 1910, that its gross earnings within the State for the year ending April 30, 1910, were $131,096.28 and that the value of its office furniture, fixtures and real estate was $18,473.98. The board assessed the value of its property $289,877.00, and assessed a tax of 28 mills on the dollar upon it which made its tax $8,116.65. The American Express Company made a similar report and received a similar assessment. It is admitted in the answer that the testimony for the defendant was that in making these assessments of the plaintiff's property the board considered, among other things, the earnings of and the business done by the companies in the State of South Dakota, and defendant's counsel in their brief in this court say "As has been said, the board of assessment of South Dakota did consider among other things, the income of appellant, so far as they could ascertain it, the contracts of appellant with the railway companies, the uses to which its property was put, and the intangible as well as the tangible assets in this State, in fixing this valuation. If this was wrong, then the tax must fall; but we contend it was not wrong."

It is conceded that the Board was without either constitutional or statutory authority to tax either the gross or net earnings of the company in the State of South Dakota in lieu of all

other taxes or of taxes on its property, and that the limit of its lawful power was to assess and tax its "real and personal property according to its value in money, * * * so that every person and corporation shall pay a tax in proportion to the value of his, her or its property" as the constitution requires. The value of real and personal property in money is the amount that can be realized from it by a sale of it within a reasonable time and that is the valuation at which the local assessors were required to assess, and presumptively did assess, the property of individuals and of the vast majority of the tax payers in the State of South Dakota. Counsel argue that the assessors of such property are not prohibited from considering the earning power of that property for the purpose of ascertaining its actual value. But this contention is fallacious and irrelevant in this case. In the first place while such assessors may and doubtless do consider the rental value and in that sense the earning power of some kinds of real and personal property, it is common knowledge that the customary and lawful measure of the value of such property which they use is the selling value of the property, and in the second place, it was not the earning power of plaintiff's property in South Dakota that the Board considered as a measure of its value, but the earnings of the plaintiffs themselves, the earnings of the owners of the property.

The first question in this case, therefore, is whether or not taxation at a uniform rate, at the rate of 28 mills on the dollar in this case, of the real and personal property of one tax payer on a valuation measured by its selling value in money and of the real and personal property of another tax payer on a valuation measured by the earnings of the owner of the property as well as by its selling value, is equal and uniform taxation of the real and personal property of both so that each "person and corporation shall pay a tax in proportion to the value of his, her or its property" as the constitution requires. This question seems susceptible of but one answer, it seems impossible that such assessment could produce equal and uniform taxation according to the value in money of the property assessed. Counsel for the defendant, however, invoke the familiar rule that the national courts follow the settled construction by the highest judicial tribunal of a state of its constitution and laws where no question of general or commercial law or of the constitution or laws of the United States is involved, and insist that the Supreme Court of South Dakota decided in *State ex rel. American Express Co. v. State Board of Assessment and Equalization*, 3. S. D. 338, that a statute which authorized the Board to consider the gross earnings of a corporation in making the assessment of its property did not violate the constitution of

that State. The opinion in that case has been carefully and repeatedly read and searched in vain for any presentation, discussion, reference to or decision of the question whether or not a statute which required the Board to take into consideration the gross earnings of one class of tax payers in assessing their real and personal property for taxation while the assessors of the property of other classes were not required to and did not take their earnings into consideration in assessing their property, was violative of the provisions of the constitution which have been cited. The only constitutional question mentioned in that opinion is whether or not the taking into consideration by the Board of the contracts of the express company with the railroads which related to transportation to and from some places without as well as those within the State was an invasion of the right to conduct interstate commerce and therefore a violation of the constitution of the United States, 3 S. D. 350. It is true that the court considered and decided that the Board did not violate the statute under consideration in that case by taking into consideration in making its assessment the gross earnings of the express company, 3 S. D. 347, which by its terms that statute expressly authorized the Board to consider, as does the statute now in hand, but the position was nowhere taken, discussed, considered or decided that the statutory grant of this authority to the Board was in violation of the constitution of the State. The result is that the decision of this question may not be lawfully avoided by this court on the ground that the highest judicial tribunal of the state has settled it, and the authoritive words of Chief Justice Marshall govern here. "General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyod the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat, 264, 203; *King* v. *Pomeroy*, 121 Fed. 287, 294, 58 C. C. A. 209 216; *Tracr* v. *Fowler*, 144 Fed. 810, 817, 75 C. C. A. 540, 547; *Mason City & Fort Dodge Ry. Co.* v. *Wolf*, 148 Fed. 961, 968, 78 C. C. A. 589, 596; *Evans* v. *Victor*, 204 Fed. 361, 367, 122 C. C. A. 531, 537.

An attempt is also made to sustain the constitutionality of this statute and the validity of the assessments of the plaintiff's property under it by the decisions in *State* v. *United States Express Co.*, 114 Minn. 346, 131 N. W. 489; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 348, and *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688-696-697. But the Constitution of Minnesota expressly authorized the Legislature of that State to impose a tax upon the gross earnings of express companies, Art. 9, Sec. 17, and it contained no such requirements or

restrictions as those that have been cited from the Constitution of South Dakota. The Legislature of Minnesota under the Constitution of that State passed an act providing for a six per cent tax on the gross earnings in Minnesota of express companies in lieu of all other taxes. Revised Laws Minnesota 1905, Secs. 1013, 1019. The State sued the Express Company to recover this six per cent of certain earnings which the Express Company had derived from business which that Company claimed constituted interstate commerce and hence was exempt from taxation by the State under the commercial clause of the Constitution of the United States. The Supreme Court of Minnesota in the case first cited above adjudged this claim and held that a part of these earnings were and a part were not exempt from taxation by the State under the Constitution of the United States. 131 N. W. 490. In the discussion of this question the court re-affirmed its previous decisions that these taxes on gross earnings of corporations in lieu of all other taxes pursuant to the express authority of the Constitution of Minnesota were in reality taxes on the property of the corporation measured by their gross earnings. 131 N. W. 491, 492. When this case reached the Supreme Court the only question it presented there was whether or not any of the gross earnings upon which the Minnesota court had sustained the tax were exempt from taxation under the commercial clause of the Constitution of the United States and that court held that they were not. 223 U. S. 347, 348. In the course of its opinion the Supreme Court of the United States recited the fact that the Minnesota court had construed the tax to be a tax upon the property of the Company measured by its gross earnings within the State and remarked that it was not prepared to say that this conclusion was not well founded in view of the provisions and purposes of the law. In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. C. 688, 696, the only question before the court was whether or not a tax levied by the State of Mississippi was violative of the commercial clause of the Constituton of the United States and upon that issue alone are the remarks of the court either authoritative or material. Thus it appears from a review and analysis of these decisions upon which defendant's counsel seem to rely (1) that the only question at issue or decided in any of them was whether or not certain taxes were levied in violation of the commercial clause of the Constitution of the United States, (2) that the construction in the Minnesota case that a tax on the gross earnings in a State of a corporation is a tax on its property therein measured by the gross earnings was based on express authority in the Constitution of that State to tax the gross earnings and on the fact that such tax was levied in lieu

of all other taxes on its property and (3) that there is nothing in the adjudications or opinions in these cases to the effect that in the absence of express authority in the Constitution of a State to levy taxes on the gross earnings of a corporation and in the face of positive declarations therein that all taxes "shall be equal and uniform," that "all taxes raised in this State shall be uniform on all real and personal property according to its value in money * * * so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property" and that "the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property" a statute which requires the taxation of the property of a corporation on an assessment of its property by the consideration of the gross earnings of the corporation in the State and the value of its property while the property of the vast majority of the tax payers of the State is taxed upon assessments measured by the actual value of their property without any consideration of the earnings of its owners is not violative of these constitutional restrictions, or that an assessment made in accordance with such a statute is not void. And so the question recurs and demands its answer.

It is conceded that the people of a state may, by express provisions in its construction, authorize their legislative and executive officers to measure the assessable value of the taxable property of a corporation by its gross earnings in the state. That is not the question which this case presents. The question here is, may such officers measure the assessable value of the real and personal property of the corporation by the earnings of that corporation in the state, or by a consideration of the earnings of the corporation without such constitutional authority and in deflance of the stringent and mandatory restrictions of the Constitution of South Dakota. In a simple case the answer seems not to be doubtful. If each of two individuals owns real and personal property of the same actual value and has gross earnings of $100,000.00 a year, and one of them is taxed on an assessment of his real and personal property measured by its actual value in money without a consideration of his earnings, and the other on an assessment of his like porperty measured by his gross earnings and the actual value in money of his property, or if the value of the property of one is assessed without and that of the other with a consideration of his gross earnings, that taxation certainly cannot be equal and uniform, it cannot be such that each will pay a tax in proportion to the value of his property for the consideration of the gross earnings

is required by the South Dakota statute to have and it unavoidably would have an effect upon the assessment. If an individual and a corporation are in the same business, as commission merchants, grocers, wholesale dealers in dry goods, or as carriers or in any other occupation and the real and personal property of the former is assessed at its actual value in money measured by or with a consideration of his gross earnings, while the real and personal property of the latter is assessed at its value in money measured without regard to its gross earnings those taxes must be other than uniform so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. Under the constitution and laws of South Dakota the assessment of the property of individuals is required to be and is measured by its actual value in money without any consideration of the gross earnings of its respective owners. The constitution commands that "the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property." Section 17 of Chapter 64 of the Laws of South Dakota requires the assessment of the property of express companies to be, and in this case it has been, measured by its actual value in money with a consideration of the earnings of the company in that State, and no logical or lawful way of escape is perceived from the conclusion that this is not "as near as may be" the same method provided for the assessment of the property of individuals because an assessment of the property of these corporations at their actual value in money without a consideration of their gross earnings might have been prescribed and followed.

The constitution requires taxation to be uniform "so that every person and corporation shall pay a tax in proportion to his, her, or its property." The assessment of the property of individuals is required to be and is measured by its actual value in money without consideration of the gross earnings of its respective owners. Section 17 of Chapter 64 requires the assessment of the property of express companies to be, and in this case it has been, measured by its actual value in money with a consideration of the earnings of the companies and a substantially uniform tax of 28 mills on the dollar has been levied upon these assessments. Taxes so raised cannot be uniform so that every person and corporation shall pay a tax in proportion to his, her, or its property and no doubt remains that the portion of Section 17 of Chapter 64 which required the Board to take into consideration the gross earnings of express companies within the state in making assessments of their property for taxation violated the Constitution of South Dakota nor that the

assessments so made and the taxes levied upon them in 1910 were equally violative of that Constitution, unauthorized and void and that must be the decree in this case.

There are other considerations that confirm our minds in this conclusion. The Constitution of South Dakota has been amended since 1910 so that it no longer requires that all taxes shall be "uniform on all real and personal property according to its true value in money" and so that it provides that "gross earnings and net income shall be considered in taxing corporations," amendments clearly not made without just reason.

There were five express companies doing business in South Dakota in 1909 and 1910 under contracts with railroad companies to pay to the latter from 45 per cent to 55 per cent of their gross earnings from the transportation of express business over their lines. As the amounts paid to the railroad companies by the respective express companies were approximately one-half of the amounts of their gross earnings from the transportation of the express business over these railroads in South Dakota the amounts so paid furnished a ready measure of the gross earnings of the respective companies from their transportation business over these railroads. The amount paid to the railroad companies by Wells Fargo and Company was $181,193.72, and its assessment was 1.59 of that amount or $289,877.00. The amount paid to the railroad companies by the American Ex-Company was $120,689.56, and its assessment was 1.60 of that amount or $193,260.00, and this although the value of the office furniture, fixtures and real estate of the former was reported to be $18,473.98 and the number of miles it operated in South Dakota 1621, while the reported value of the office furniture, fixtures and real estate of the latter was $9,151.73 and the number of miles operated by it in South Dakota 1363. The amount paid the railroad companies by the United States Express Co. was $6,812.22, and its assessment was 1.59 of that amount or $10,899. The amount paid the railroad companies by the Western Express Company was $1,507.28, and its assessment was 1.51 of that amount or $2,262.00, and the amount paid the railroad companies by the Great Northern Express Company was $6,626.47, and its assessment was 1.71 of that amount or $11,-278.00. How comes it that the assessments of three companies who were doing the larger part of the express business in the state were the same percentage within one per cent of the respective amounts they paid to the railroad companies? There is but one rational explanation of this fact and that is that the Board measured the assessments of these companies by the amounts these companies paid to the railroad companies respectively, that is to say, by their gross earnings from their

transportation business over the railroads on the theory that the amounts paid to the railroads were about fifty per cent of their respective gross earnings. It is incredible that the board could have estimated or guessed at the value of the property of these companies in any other way so accurately that their estimates would come with 1/160th of the same percentage of each of the respective amounts which the express companies paid to the railroad companies. There is, it is true, testimony in this record tending to show that in making these assessments the board considered not only (1) the reports of the railroad companies which showed the amounts paid to them by the express companies and the reports of the express companies of their earnings, but also (2) the mileage of their respective systems, (3) the number of their respective offices in the state, (4) the values of their respective furnitures, fixtures, horses, wagons and safes and (5) of other things they could obtain relevant to the value of their respective properties. But the uniform relation of the assessments of the three principal companies mentioned to the respective amounts they paid to the railroad companies is more persuasive than the testimony of many witnesses that the effect upon the assessments of their property of the consideration of all things except the amounts paid by them to the railroad companies, was negligible, and that those amounts taken as the representatives of one-half of the earnings of these express companies from their transportation business in the state were the real measures of the assessments made upon their property by the board. And when to these compelling facts is added the consideration that there has already been an adjudication after full hearing on the merits that this board measured the assessments it made against these express companies in the preceding year by their earnings indicated by their payments to the railroad companies, no doubt remains that the assessments under consideration were measured by the earnings of the companies and not by the value of their property in money, and the conclusion that they are unconstitutional and void becomes irresistable.

Finally counsel for the defendant argue, as we understand their brief, that although the law under which the assessments were made is unconstitutional and the assessments and taxes are void still the plaintiffs are entitled to no injunction against their collection, (1) because they failed to state in their reports to the board the value of all their property in the state or used in the state as required by Subdivision 5 of Section 16 of Chapter 64 of the Laws of South Dakota of 1907; but their failure so to do, if they so failed, and there is positive and persuasive testimony in the record that they did not, is not such iniquity as

repels a plaintiff from the precincts of a court of equity, (2) because neither mere illegality, nor irregularity, nor injustice is sufficient to sustain an injunction to restrain the collection of a tax; but these taxes are not irregular, or illegal, or unjust only. The record has convinced that they are unjust and excessive, that they are irregular and unlawful, but they are also unconstitutional and void, and their collection would constitute a taking of the property of the plaintiffs without due process of law in violation of the national constitution, and the action of the board in making the assessments and levying the taxes was either a gross mistake equivalent to a fraud or an actual fraud, and mistake and fraud are immemorial grounds of equity jurisdiction, (3) because the plaintiffs have an adequate remedy at law; but this is the second time this board has made in the same way unlawful assessments of the property of these plaintiffs which effect an unjust and unconstitutional discrimination in taxation against them and their property. Its action has been systematic and repeated and a systematic, repeated continuing violation of the constitution or the law to the injury of a plaintiff like a continuing trespass, presents ample reason for an injunction against its continuance. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sullivan,* 173 Fed. 456, 471; *Cummings* v. *National Bank,* 101 U. S. 153, 158; *Raymond* v. *Chicago Traction Company,* 207 U. S. 20, 36, 37; *Railroad and Telephone Companies* v. *State Board of Equalizers* (C. C.) 85 Fed. 302, 307, 318; *Fargo* v. *Hart,* 193 U. S. 490, 503; *Reagan* v. *Farmers' Loan & Trust Company,* 154 U. S. 362, 391* *Nashville, C. & St. L. Ry.* v. *Taylor* (C. C.) 86 Fed. 168, 184; *Louisville Trust Company* v. *Stone,* 107 Fed. 305, 46 C. C. A. 299, (4) because the plaintiffs have an adequate remedy at law; but the plaintiffs now have and are entitled, as against these unconstitutional taxes, to the right to keep the amount required to pay them. The rights of the parties have been litigated and determined. The only remedy at law the plaintiffs have is either to defend against a proceeding to collect the taxes on the same grounds which have been presented and sustained in these suits, or to pay the amounts of these taxes under protest and bring actions at law to recover them back. Neither of these remedies is as prompt, as certain, or as complete as the immediate decree of this court and its injunction to which the plaintiffs have established their right in this litigation.

The decrees below must be reversed and the cases must be remanded to the court below with instructions to render decrees for the plaintiffs in accordance with the views expressed in this opinion.

Filed April 24, 1914. (214 Fed. Rep. 180)

INDEX.

CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1915

Nos. 277 and 278

GEORGE G. JOHNSON, AS TREASURER OF THE STATE OF SOUTH DAKOTA, *Appellant*,

vs.

WELLS FARGO & COMPANY, *Appellee*.

AND

GEORGE G. JOHNSON, AS TREASURER OF THE STATE OF SOUTH DAKOTA, *Appellant*,

vs.

AMERICAN EXPRESS COMPANY, *Appellee*.

Appellant submits the following in addition to what is contained in his regular printed brief herein, upon two of the questions presented by this appeal.

AN ADEQUATE REMEDY AT LAW.

First. Do the statutes and laws of the State of South Dakota afford to this plaintiff Express Company, an adequate remedy at law against the wrongs of which the plaintiff complains in this case? As pointed out in said

printed brief taxes against express companies in South Dakota are collected not by the several county treasurers but by the State Treasurer, and if the taxes are void as claimed by the Express Company an action for damages against the State Treasurer and his bondsmen would lie for the recovery of the taxes wrongfully collected.

Rushton vs. Burke, 6 Dak., 478.

Since under the facts as they obtain in this case damages for the wrongful collection of taxes could be recovered in a proper action, and since no cloud has been or can be cast upon real estate belonging to the plaintiff, it is respectfully submitted that such an action for damages would afford a complete and adequate remedy. But in addition to such an action at law we now call attention of the Court to another possible, and we think adequate remedy at law, permissible under the statutes of South Dakota. In Chicago and Northwestern Railway Company vs. Rolfson, *et al.*, 23 S. D. 405, the Supreme Court of South Dakota holds that an injunction will not lie to restrain collection of an illegal tax for the reason that in the case presented, it did not appear that the plaintiff was without an adequate remedy at law. The South Dakota Court in that case states that the plaintiff could have paid its taxes under protest and have recovered back the amount paid by a suit against the county; also that the plaintiff in an action at law could have recovered damages in the amount of the taxes paid, by a suit at law against the tax collector. The opinion of the Court in the case just cited is as follows:

"The plaintiff claims that in October, 1905, two written notices and demands for payment of personal property taxes were caused to be issued by defendant Peterman, as sheriff of Kingsbury County, one of which notices and demands required that plaintiff pay the sum of $469.45, tax, $4.69, penalty and interest, $19.96, expenses, total $494.10, for personal property taxes charged against

plaintiff in DeSmet township for the year 1904, and which other notice and demand required plaintiff to pay $95.44, tax, $7.64, penalty and interest, $5.21, expenses, total, $108.20, charged against plaintiff in DeSmet township, for road taxes for the year 1904, and both which notices and demands recited: 'This sum I will collect forthwith as provided by chapter 48, Laws of 1901, and unless you pay said taxes before I call it will be necessary for me to charge you mileage, expense of levy and keeping and other expenses, which fees must be turned into the county treasury. You will save trouble and expense by paying at once. This notice is sent to give you an opportunity to avoid costs, as the law directs me to levy on your property'—and both of which notices were signed by W. T. Peterman, sheriff of Kingsbury county. The plaintiff further claims that the said tax of $469.45 was the second installment of a personal property tax of $938.91, charged against plaintiff in said DeSmet township, and that plaintiff duly paid the first installment thereof, and that in September, 1905, plaintiff offered and tendered to defendant Rolfson as Treasurer, the second installment of $469.45, but that said Rolfson refused to receive and accept the same, for the alleged reason that there was a further tax of $95.44, charged against plaintiff for a road tax in said township, but which road tax plaintiff claims to be illegal and void in not having been authorized by the township electors, as provided by law, and that said road tax was never legally levied or assessed by the board of supervisors of said township. The plaintiff commenced this action in Circuit Court to restrain the collection of the said taxes mentioned and referred to in the said notices and demands, and in its complaint, in substance, alleged the foregoing statement of facts. Defendants answered, admitting the service of said notices and demands for payment, and admitted that plaintiff had offered and tendered said $469.45, and that defendant Rolfson refused

to receive and accept the same, for the alleged reason that there was charged against plaintiff the further sum of $95.44, road tax. Defendants denied the illegality of said road tax, and alleged that the same had been duly authorized by the township electors, and that said road tax had been duly and legally levied and assessed. There was trial by the court, without jury, on the issues thus presented, and findings and judgment in favor of the defendants.

At the outset we are met with the proposition that the remedy of injunction will not lie to restrain the collection of a personal property tax under the circumstances of this case. The respondents contend that injunction should not lie, because plaintiff had adequate remedy at law, and should not be permitted to resort to the equity side of the court. It is the contention that plaintiff should have first paid said tax under protest, and then brought action to recover back the portion alleged to have been illegal or irregularly charged against plaintiff; that plaintiff migth have waited until its property had been seized for such tax, and then maintained an action for damages in the nature of trespass. In this contention we believe respondents are in the right. The general rule seems to be thus stated in Cooley on Taxation (page 772): 'When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult, in most cases, to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal, and the party makes payment, he is entitled to recover back the amount. The case does not differ in this regard from any other case in which a party is compelled to pay an illegal demand. The illegality alone affords no ground for equitable interference, and the proceedings to enforce the tax by distress and sale can give none, as these only constitute an ordinary trespass. To this point the decisions are numerous. The exceptions to this rule, if any, must be of cases which

are to be classed under the head of irreparable injury; as, when the enforcement of a tax might destroy a valuable franchise, or when property is levied upon which possesses a peculiar value to the owner beyond any possible market value it can have, and other like cases where the recovery of damages would be inadequate redress. *A case would be exceptional, also, if under the law no remedy could be had to recover back the moneys paid.'* This appeals to us as being the true rule, although we are aware that in some jurisdictions the remedy by injunction is sustained in all cases of illegal taxation. Under the complaint and under the evidence there is nothing to bring the case within any of the exceptions to the general rule. There is no reason why plaintiff could not have paid these taxes under protest, and then recovered back, if they were illegal. Under the circumstances of this case taxes paid under protest could have been recovered back. St. Anthony & Dak. El. Co., vs. Rottineau Co., 9 N. D. 346, 83 N. W. 212, 50 L. R. A. 262; Baltimore v. Lefferman, 4 Gill 425, and cases cited in note. There is no reason shown why plaintiff could not have maintained an action for damages in case of seizure of any of its property, in case the said tax was illegal. There is nothing to show that any possible irreparable injury might have occurred by reason of a seizure or that any of the property was threatened with seizure that possessed any peculiar value to plaintiff that damages would not redress. The rule laid down in Frost vs. Flick, 1 Dak. 126, 46 N. W. 508, is applicable to the circumstances of this case. In that case it is held that the courts of equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities in the assessment of the tax, or in executing the power conferred on taxing officers, unless it is shown that fraud has been practiced by the taxing officers, or unless there is something to show that the injury resulting from such enforcement would be

irreparable. Numerous cases hold to the same view. M., St. P. & S. S. M. Ry., vs. Dickey County, 11 N. D. 107, 90 N. W. 260; Schaffner vs. Young, 10 N. D. 245, 86 N. W. 733; Chicago & N. W. Ry. vs. Ft. Howard, 21 Wis. 44; Schurmeier vs. St. Paul Ry., 8 Minn. 113; Odlin vs. Woodruff, 31 Fla. 160, 12 South 227, 22 L. R. A. 699, note; Whiting vs. Boston, 106 Mass. 89; Milwaukee vs. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; Greene v. Mumford, 5 R. I. 472. It is not necessary to pass upon other questions presented by the briefs, as we are of the opinion plaintiff cannot maintain the remedy by injunction to test the legality of the said road tax. The judgment of the Circuit Court is affirmed."

In this South Dakota case St. Anthony Elevator Company vs. Bottineau Company, 9 N. D., 343, is cited with approval and in that case the Supreme Court of North Dakota holds that void taxes paid under protest may be recovered back from the county although there has been no seizure or attempted seizure of the plaintiff's property. This South Dakota decision is based upon no definite statute in South Dakota but upon the common law in the State as understood and announced by the courts.

It is, of course, recognized that under the common law even though an action would lie against a county to recover back illegal taxes paid under protest, that such an action cannot be brought against the State for the reason that the State cannot be sued without its consent. But in South Dakota the State has consented to be sued and the appellant therefore contends that the principle announced in the South Dakota case and the North Dakota case above cited would apply to the case at bar where the taxes were to be paid into the State treasury instead of into the county treasury. The consent which has been given by the State of South Dakota that suit may be brought against it is contained in sections 25 to 28 of

the 1903 Code of Civil Procedure of South Dakota, which sections are as follows:

"SECTION 25. It shall be competent for any person deeming himself aggrieved by the refusal of the State auditor to allow any just claim against the State, to commence an action against the State by filing a complaint setting forth fully and particularly the nature of the claim, with the clerk of the Supreme Court, either in term time or vacation. He shall at the same time file an undertaking, with two or more sureties, to be approved by the State Treasurer, to the effect that he will indemnify the State against all costs that may accrue in such action, and pay to the clerk of said court all costs in case the plaintiff shall fail to prosecute his action, or to obtain a judgment against the State, not exceeding five hundred dollars; and thereupon the action shall be placed upon the calendar of said court.

"SEC. 26. The plaintiff, within ten days after having filed such complaint and undertaking, shall serve a copy of the complaint upon the Attorney General, together with a notice to demur or answer thereto within a period of time not less than thirty days from the time of such service; and the Attorney General shall thereupon be required to answer or demur within the time expressed in such notice.

"SEC. 27. The Supreme Court shall proceed to hear and determine such action. If an issue of fact shall be made in such action, which the court shall deem necessary to be tried by a jury, it shall certify such issue of fact to the Circuit Court of the county in which the plaintiff resides, if he be a resident of this State, if not, then to the Circuit Court of any county which said Supreme Court may designate, and such court shall proceed at the next regular term to try the same by jury as in other cases, and the verdict rendered, together with the papers in the action received from the Supreme Court, shall be sealed up and returned to the clerk of

the Supreme Court with all convenient speed. At the request of either party a bill of exceptions may be settled, as in other trials by jury, and returned with the verdict, and thereupon the Supreme Court may render and enter judgment therein or again certify the same question of fact to the same Circuit Court, to be tried and returned as above provided, and may grant a new trial of any issue of fact as often as it shall be satisfied that there is good cause therefor. The judgment rendered by the Supreme Court in such action shall be conclusive and final.

"SEC. 28. No execution shall issue against the State on any judgment, but whenever final judgment against the State shall have been obtained in any such action the clerk (of the Supreme Court) shall make and furnish to the State Auditor a duly certified transcript of such judgment, and the auditor shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the State treasury."

These statutes it will be noted, are broad and comprehensive and are made especially to cover "any just claim against the State" which the State auditor may refuse to pay, and at section 28 as above quoted, it is made the special duty of the State Auditor to audit the amount of damages and costs, when judgment is secured, and the section provides that "the same shall be paid out of the State treasury."

The appellant therefore contends that an adequate remedy at law is clearly available for the plaintiff, even if as the plaintiff contends the taxes here involved are unconstitutional and void, and appellant contends that the statutes above quoted together with the decision of the South Dakota Supreme Court above cited, bring this case within the rule announced by the Supreme Court of the United States in Singer Sewing Machine Company vs. Benedict, 229 U. S. 481, and by the Circuit Court of Appeals of the Eighth Circuit, in U. P. Ry. Co., vs. Board

of Commissioners, 133 C. C. A. 392. In both of these cases injunctions were prayed against the collection of illegal taxes, but the injunctions were denied upon the ground that the following statute of the State of Colorado afforded a tax payer an adequate remedy at law against the collection of the illegal tax. The statute is 5750 of the Revised Statutes of Colorado and is as follows:

"In all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the tax payer."

In this connection appellant also desires to call the attention of this court to the case, Bank of Kentucky vs. Stone, *et al.*, 88 Fed. 383, where the Circuit Court of the United States in an opinion by Judge Taft, with Justices Harlan and Lurton concurring, quoting from the Syllabus, said: "A suit in Federal Court to enjoin the collection of a tax will not lie on the sole ground that it is illegal and void. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. In Kentucky an action to recover taxes paid does not lie except when the payment has been made under duress of a distraint made by the collection officers. In a State where an action to recover taxes paid will only lie when they have been paid under a duress of a distraint, such remedy is not an adequate one *where the tax officers instead of distraining may bring an action at law to collect the taxes. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.* The right to defend against an action at law on

the ground of the invalidity of the statute under which they were assessed is not an adequate remedy when the statute, like the Kentucky revenue law of November 11, 1892, provides that the party failing to pay the taxes within a specified time shall be subject to a penalty and to a fine for each day of delay to be forced by indictment or civil action."

The appellant submits that in the Kentucky case the Court clearly says by inference that the right to pay taxes under duress of distraint and then to recover back would be an adequate remedy at law if it were not for the law which would permit the tax collector to bring suit for the taxes in an independent action. In view of such a statute the court recognized that the tax collector might never distrain or threaten to distrain and that the tax payer might therefore be subjected to a fine and penalty imposed by the laws of Kentucky for failure to pay the tax within the time allowed. The statutes of South Dakota contain no provision for fine and penalty comparable with this contained in the statutes of Kentucky. In South Dakota a penalty of 1 per cent per month is imposed by statute for failure to pay taxes before they become delinquent, and it is submitted that under the South Dakota statute the tax payer would be bound to pay this penalty even though an injunction were granted, if that injunction were finally set aside on appeal, and that therefore the remedy by injunction under the South Dakota statute would not be any more adequate so far as this penalty is concerned, than the remedy by an action at law to recover back the taxes paid. In fact the payment of the tax before the penalty is added followed by a suit to recover back the amount would be even a more adequate protection to the tax payer so far as this penalty is concerned, than a suit in equity, for if an equitable action should be taken, and after some years of litigation the equitable relief should be denied, then the tax payer would be bound to pay the full

amount of the penalty which would be imposed for the full time during which the action was pending.

Is Statute Constitutional?

The second question which we desire at this time to consider is, whether Chapter 64 of the South Dakota session laws of 1907, is in violation of the Constitution of South Dakota. The statute and the constitutional proivsions involved are set out at pages 41 to 53 of the appellant's brief herein. It will be noticed that this statute provides the manner of assessing not only the property of express companies but the property of railroad, telegraph and telephone and sleeping car companies as well. It is provided that the assessment of these properties shall be made not by local assessors but by a State Board, and also that the tax shall be collected not by the treasurers of the counties of the State, but by the State Treasurer. Legislation of this general character in the jurisdiction of the State of South Dakota is older than the State itself. Section 1 of Chapter 99 of the Session Laws of Dakota Territory of 1883 provides that railroad companies shall be assessed by a gross earnings tax which is specifically imposed by the statute itself. That section is as follows:

"Section 1. Percentage of Gross Earnings to be Paid in Lieu of Other Taxes. In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in the territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this territory a percentage of the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall

be situated within this territory, as hereinafter stated, that is to say: Every such railroad corporation or person operating a railroad in this territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half (½) on or before the fifteenth day of February, and one-half (½) on or before the fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the Governor of this territory, or any other person appointed by law, to examine under oath the officers and employes of said company, or other persons, and if any person so examined by the Governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the territory the payment of the aforesaid per centums, it is hereby declared that the territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real, or mixed. And the lien hereby secured to the territory shall have and

take precedence of all demands, decrees and judgments against said company."

This gross earnings law just quoted remained in effect in the territory of Dakota until the session of 1889, when the statute was repealed and railroad property was assessed in the same manner as other property (Chapter 105, Session Laws of Dakota of 1889). This statute was passed and went into effect January 29, 1889.

The constitutional convention which drafted the constitutional provisions that are involved in this action assembled on the 4th day of July, 1889, and the constitution of South Dakota was adopted at a general election held October 1, 1889. At the first session of the Legislature of South Dakota, after the adoption of said constitution, the Legislature of South Dakota enacted Chapter 21 of the Session Laws of 1890. This 1890 statute we do not here quote in full, but it provides for substantially the same statement to be furnished to the State Auditor as that called for by the 1907 statute that is here involved. This 1890 statute also creates a State Board of Assessment and Equalization, and provides that certain property, including the property of railroad companies, telegraph and telephone companies, shall be assessed, not by local assessors, but by the State Board of Equalization. At section 4 of this 1890 statute it is made the duty of the State Board in assessing property of railroad companies "to take into consideration the gross and net earnings per mile for each division thereof, separately, for the year ending on the 30th day of April preceding, and any and all other matters necessary to enable them to make a just and equitable assessment of said railroad, with respect to each county through which said railroad passes." This statute also, at section 13 thereof, requires telephone and telegraph companies to furnish a similar statement showing specifically the total gross and net receipts of the company for the preceding year. At section 15 of said statute, the assessing

board is authorized to take into consideration all facts shown in the statement furnished in determining the assessment of telegraph and telephone properties so that such properties shall be assessed at the same ratio as the property of individuals.

The next session of the Legislature of the State of South Dakota, which assembled in January, 1891, enacted Chapter 14 of the Session Laws of 1891, which is in reality a codification of the laws then in effect on the general subject of assessment and taxation. But in addition to the laws previously enacted this 1891 statute provides a special method of assessing the property of express companies and sleeping car companies. At section 65 of this 1891 statute, express companies are required to furnish a statement which is identical with the statement required by the 1907 statute; and at section 66 of this 1891 statute the Board of Assessment and Equalization is required in assessing the property of an express company "to take into consideration the gross earnings of said company within the State for the year ending on the 30th day of April preceding, and any and all matter necessary to enable them to make a just and equitable assessment of such property in the same ratio as the property of individuals."

These statutes have been revised and re-enacted in 1897 and again in 1903 and further in 1907 and 1909, but the statute in the form in which it was when the tax that is involved in this action was levied, is not different in any respect in principle from the statute above mentioned enacted by the first Legislature of the State of South Dakota. It is not here contended that the fact that other Legislatures than that of 1907 have enacted laws similar to the law that is here involved, is proof that the Legislature of 1907 had power to do what it assumed to do, but it is respectfully urged that the history of this legislation in South Dakota should be taken into consideration in determining the question

as to whether the statute of South Dakota and the constitution of South Dakota are in conflict. There can be no gainsaying the fact that if the 1907 statute that is here involved is unconstitutional, then practically every statute on the subject of assessment and taxation that had been enacted in South Dakota up to that time was also unconstitutional. The constitutional convention which drafted sections 2 and 3 of article 11 of the South Dakota constitution must have been familiar with the territorial statute above quoted, which had imposed a gross earnings tax upon the earnings of railroad companies. It is not contended that the constitution of South Dakota as it existed in 1910 permitted a gross earnings tax, but attention is called to the fact that the constitution does not specifically forbid all reference to the gross earnings of railroad companies in determining the value of their property. It is true that the constitution provides that all taxes shall be uniform on real and personal property, but it also provides that the value of property for purposes of taxation shall be "ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law." The appellant contends that this provision of the constitution was placed there in recognition of the well known fact that different kinds or classes of property must be assessed according to different rules. The constitutional requirements that all property shall be assessed according to its value in money does not mean that the value of all property shall be determined in the same manner. In fact the implication in the constitutional provision above quoted is that there shall be different rules of appraisement, for the Legislature is authorized not to make a "rule of appraisement" but "such rules of appraisement and assessment" as may be necessary. The appellant contends that if different properties or different classes of property are such as to require different rules for the determination of their value, that the Legisla-

ture has ample and plenary power to provide these different rules.

It can hardly be maintained that the people who framed and adopted these sections of the South Dakota Constitution intended that they should have the interpretation that is given them by the plaintiff in this action. It is well known that the Legislature of South Dakota of 1890 was made up largely from the men who had been members of the constitutional convention which drafted these provisions of the Constitution. The Constitution had been adopted only a few months before the Legislature of 1890 convened. The meaning and purpose of these different constitutional provisions had been discussed not only in the convention, but over the whole State. If the language that was used in this section had been intended by the constitution makers to mean what is contended by the plaintiff here, it can hardly be believed that the very first Legislature which assembled just three months after the Constitution was adopted, would have disregarded or misconstrued that language and passed the 1890 statute above mentioned.

Attention is also called to McHenry, *et al.*, vs. Alford, *et al.*, 168 U. S. 651, 42 Law Ed., 614. In this case this court had occasion to construe the gross earnings tax law of 1883 above quoted in connection with the Organic Act of Dakota Territory. Section 6 of said Organic Act (Revised Statutes of the United States, section 1925), is as follows:

"And be it further enacted that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No taxes shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall any law be passed im-

pairing the rights of private property, *nor shall any discrimination be made in taxing different kinds of property; but all* property subject to taxation shall be *in proportion to the value of the property taxed.*"

In this case just cited this court was asked several questions by the Circuit Court of Appeals for the Eighth Circuit and among them whether the gross earnings act above mentioned was in conflict with the Organic Act of the Territory of Dakota. The real question that was involved in this case was whether lands owned by the railroad company but not used specifically in connection with the railroad company's business were subject to the same tax as land owned by private individuals in view of the gross earnings tax imposed upon the railroad company. We quote the following from the opinion of the court in this case:

> "While we agree that property of the same kind and under the same condition, and used for the same purpose cannot be divided into different classes for purposes of taxation, and taxed by a different rule simply because it belongs to different owners, yet, where the situation and the possible use and the present condition of the ownership of lands are wholly different—such as they are in this case—from ordinary ownership, a classification is not arbitrary or unreasonable which places such lands outside of the classes of lands owned in the ordinary way by individuals. * * *
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> * * * Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the Organic Act. Objection is also made to the act of 1883 on the ground that it is in violation of the commerce clause of the Federal Constitution.
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> * * * A perusal of the first section of the act does not render it at all clear that there was intended to be a tax on any portion of the gross

earnings of the corporation which arose from interstate commerce. The language of the act which declares that the tax should be paid into the treasury of the territory, upon a percentage of the gross earnings of the corporations owning or operating such railroads 'arising from the operation of such railroad as shall be situated within the territory,' gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce. But there is great force in the claim that the act is not subject to the objections mentioned in the above cases reported in 121 U. S. and 122 U. S., and the cases therein referred to. In these cases there was a distinct tax upon the gross earnings, without reference to any other tax, and not in substitution or in lieu of any other tax; while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. *It is a tax upon the lands and all the other property of the company; but instead of placing a valuation upon the lands and other property of the company, and apportioning a certain amount upon such valuation directly, as was the old method, a new one was established of taking a percentage upon the gross earnings as a fair substitute for the former tax upon all the lands and property of the company;* and when it is said, as it is in this act that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

We do not understand that this court in the case just cited intended to say that property of different kinds could be divided into different classes and that the prop-

erty in one class could be assessed at a higher rate than the property in another class. This, it would seem, would be contrary to the provisions of the Organic Act above quoted, for that act provides that no discrimination shall be made in taxing different kinds of property and that all property that is taxed shall be taxed in proportion to its value. To divide property into classes and then assess the property of one class at a higher rate than the property of another class would be clearly a discrimination against the property assessed at the higher rate. But in the McHenry case, as the appellant understands the court's opinion, it is permissible to divide property into classes and then to determine its value by different rules, and if different rules for this purpose are permissible under the Organic Act we submit that they must be under the provisions of the South Dakota Constitution for we contend that the general meaning and effect of the two are substantially the same. In the case at bar we are not endeavoring to sustain a gross earnings tax, as was the case in McHenry vs. Alford, but we here are simply contending that under our Constitution the Legislature has power to provide that the assessing officers in determining the actual value of certain kinds of property may take into consideration the gross earnings of that property. We readily admit that unless there is a difference between the property of express companies and ordinary property then this tax must fail. But we contend that it is absolutely essential in order to determine the value of an express company's intangible property, its contracts with the railroad company, its right to do business, its organized system, the good will of the concern, and its general situation, that it is absolutely essential that other things be considered than are considered in assessing the property of ordinary individuals.

In Missouri River Ry. Co., vs. Morris, 7 Kans., 210, the Supreme Court of Kansas passed upon a statute which

contains provisions similar to some of the provisions of the statute involved in this case. The Constitution of Kansas at Section 1 of Article 11, provides: "The Legislature shall provide for a uniform and equal rate of assessment and taxation." The statute involved in the Kansas case provided that railroad property should be assessed by a special state board and not by local assessors as was so with other classes of property; also that the real property, track, road bed, water and fuel stands, buildings, etc., be assessed as personal property and be assessed as such together with the moneys, credits, etc., of the company, and that the whole be apportioned among the several counties, giving to each such portion as the value of the property in that county bears to the whole in the State, and apportioning the rolling stock upon a mileage basis. The court holds that the statute is not unconstitutional, that the Constitution does not require that the method of taxation shall be uniform, but merely that taxation shall be at an equal and uniform rate.

And in Francis vs. Railroad Co., 19 Kans. 303, the Supreme Court of Kansas in an opinion by Judge Brewer, says:

> "Since 1869, however, the assessment and taxation of railroad property has been accomplished, not through county organizations but by independent State machinery. This difference between two methods of assessment and taxation has been before this court and its constitutionality affirmed. In other words the constitutional requirement of an equal and uniform rate of assessment does not compel the use of but a single mode or method of assessment. Different kinds of property may be assessed in different modes, and by different officers, provided only that the rate at which these different officers are required to make their assessment is uniform and the same for all."

In State *ex rel.*, vs. Jones, 51 Ohio State 492, the constitutionality of the Nichols law that is involved in Adams Express Company vs. Ohio, 165 U. S. 221, is determined. The Constitution of Ohio provides: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also of real and personal property according to its true value in money." The Nichols law provided that the property of express, telegraph, and telephone companies should be assessed by a special state board; that the express companies should make the state auditor an annual statement showing among other things the amount of its capital stock, the par value and market value of its share of stock, the amount and value of its real and personal property and a statement of its entire gross receipts. The law further provides that the assessing board in determining the value of the property of express companies shall be guided by the value of said property as determined by the value of the entire capital stock and "such other evidence and rules as will enable said board to arrive at the true value in money of the entire property within the State."

The Court holds that the statute is constitutional; that "taxation by uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property without regard to any classification. An assessment in the sense of the valuation of the property of the tax payer for the purpose of determining the proportion of the tax to be paid, should it is true, be uniform in its mode, to the extent that the property is assessed according to its true value in money. But it would not follow that different classes of property may not be valued for taxation by different officers and boards and by different modes and agencies." Upon the right of the taxing board to consider the value of the capital stock of a company the Ohio court said:

"If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot be properly said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property, or other legitimate agency.

"It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted, that by care in the selection of tenants, and in the preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation, it would be none the less the true value in money of the building, because contributed to by the operative causes that gave rise to the good will. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols Law, charged with the valuation of corporate property in this State, especially as the

capital stock when paid up, practically represents, at least, an equal value of the corporate property."

In view of all of the foregoing the appellant contends that the only objection that there can be to the appellee's taxes in this case is that the appellee's property is assessed for a larger sum than it is actually worth. But this is a question for the assessing board and not for the courts, and the burden of proof to show that the assessment made by the assessing board is in any way erroneous is certainly upon the appellee. And we respectfully and confidently submit that the appellee has failed utterly to show to the court as it failed to show to the assessing board that the assessment is excessive. In order to do this the express company should have shown what property in addition to that listed in its statement (set out in its complaint herein), it owned in South Dakota, and the value of that property. The statement covers only the tangible property of the company and the evidence is conclusive that the company owned intangible property in South Dakota in addition to tangible property listed in this statement. The appellee has failed to prove or to submit any evidence that the intangible property owned by the appellee is not worth the amount for which the entire property was assessed by the assessing board.

In the decisions of this Court in the Ohio and Indiana cases, it is recognized that the property of express companies is largely of the intangible sort. The express company's franchise to do business, its contracts with the railroad companies, the good will of the business, its organization and the connection of its tangible property with a great system that extends into other States and foreign countries, all distinguish an express company's property from other property. The value of such property, we contend, cannot be determined in the same manner as the value of other property. The Legislature of

South Dakota has, therefore, seen fit to provide that the earnings of an express company in this State, like the earnings of a railroad company, a telegraph company, a telephone company, and a sleeping car company, shall be considered in determining the value of its property of this kind, and we submit that this is a reasonable and necessary requirement, and that there is nothing in the Constitution which forbids it. In fact, if taxation in South Dakota is to be equal and uniform upon all kinds of property, we submit that it is absolutely essential that some rule other than that used to determine the value of ordinary property be used to determine the value of the peculiar property of express companies.

Counsel for applellee object to the South Dakota statute, as we understand their argument, for the reason as they say that under this statute the ownership of the property, and not its character, determines the method that shall be followed in measuring the property's value. And, as we understand the opinion, the Honorable Circuit Court of Appeals in deciding this case, took the same view. Judge Sanborn says in this opinion: "Section 17 of Chapter 64 of the Laws of South Dakota requires the assessment of the property of express companies to be, as it has been, measured by its actual value in money with a consideration of the earnings of the company in that State," and this Judge Sanborn says is unequal taxation and therefore unconstitutional. But a reading of the statute shows that this method of assessing property is not made applicable to all property which may happen to be owned by an express company and by reason of such ownership, but to "all the property of every express company doing business in this State *and used in the operation and maintenance of its business.*" If the appellee here owned either real or personal property that was not used in the operation and maintenance of its express business in this State, such other property

would be assessed by the same rule as that used in assessing other similar property.

Then it is property used in the express business that is assessed in this peculiar way. And we contend that there is good reason why such property should be so assessed. As before stated the great bulk of the property of an express company that is used in the express business is intangible and this rule is made by reason of this fact and simply to reach that class of property. It is not to be assumed, we think, that the ordinary property of an express company must, under this statute, be assessed upon the basis of its gross earnings. Two horses, for instance, one owned by an express company, and one by an individual, must, under this statute, be equally assessed, if, as a matter of fact, they are of equal value, for the statute requires that gross earnings and all other matters that may be necessary shall be considered in assessing property used in the express business in order, and to the end that, the assessing board may make "a just and equitable assessment of said property in the same ratio as the property of individuals." To this extent only are gross earnings to be considered under this statute. This limitation is as much a part of the statute as that to which the appellee objects, and when this limitation is considered we contend the equality guaranteed by the Constitution is and must be preserved.

It is argued by the appellee that in this case the assessing board took into consideration not the gross earnings of the property of the express company but of the owners of that property. But we contend that in this case the gross earnings of the express company in South Dakota, and the gross earnings of the express company's property in South Dakota must be precisely the same, for it appears from the bill of complaint herein that the sole and only business of the appellee in South Dakota is the express business, and therefore the earnings of this non-resident corporation in South Dakota must be the

earnings of its property, tangible and intangible, used in the express business in said State.

The following from the opinion of Justice Brewer in Adams Express Company vs. Ohio State Auditor, 166 U. S. 185, 41 L. Ed., 965, is submitted as sustaining appellant's contention in the case at bar:

> "The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.
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> "But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. * * * To ignore this intangible property or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?
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> "The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created

by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man. * * * Suppose an express company is incorporated to transact business within the limits of the State and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. A distinction must be noticed between the construction of a State law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and good will of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single State. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the State of Ohio, as shown in the records of these cases, its number of shares was $120,000, the market value of each $140 to $150. Taking the smaller sum gives the value of the company's property taken as an entirety as $16,800.000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio, $3,005,157.52; or a total of $3,030,327.52; the value of its personal property in Ohio, $42,065; of personal property outside of Ohio, $1,117,426.05; or a total of $1,159,491.05, making a total valuation of its tangible property $4,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount.

"But where is the *situs* of this intangible property? The Adams Express Company has, according to its showing, in round numbers, $4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the *situs* of this intangible property? Is it

simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs, not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. * * *

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."

In view of the reasoning of Justice Brewer in this Ohio case, and the facts regarding the property of express companies therein recognized, we ask for a reversal of the decision of the Circuit Court of Appeals in the case at bar. We are not seeking to uphold a law that discriminates against the property of express companies in matters of taxation, but we ask this court merely to place a construction upon the Constitution of South Dakota that will enable the State to impose a tax

upon express companies that is equal to the taxes imposed upon the property of individuals.

Respectfully submitted,

CLARENCE C. CALDWELL,
Attorney General of South Dakota,
Solicitor for Appellant.

L. T. BOUCHER, *of Counsel.*